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THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XL.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

1895.

121866

JUL 29 1942

Entered according to Act of Congress in the year 1906,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

San Francisco:
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Typographers and Stereotypers.

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AMERICAN STATE REPORTS.

VOL. XL.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

WULZEN *v.* BOARD OF SUPERVISORS.

[101 CALIFORNIA, 15.]

CERTIORARI DOES NOT LIE TO REVIEW THE ACTION OF AN INFERIOR BOARD OR TRIBUNAL in the exercise of purely legislative functions not judicial in character.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—IN MATTERS OF ASSESSMENT and taxation the same character of notice is not required as in ordinary actions in courts of justice, for the reason that in such summary proceedings it is not practicable nor usual.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW, OR DUE COURSE OF LAW, OR LAW OF THE LAND is such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—ADMINISTRATIVE PROCESS OF THE CUSTOMARY SORT is as much due process of law as judicial process, and when it is claimed that in a proceeding authorized by statute, parties in interest are not afforded due process of law, the claim should be denied, if, upon examination of the previous condition of things in use and regarded essential to the protection of the rights of the individual under such circumstances, it is found that the course prescribed by the statute assailed is in substantial compliance with such essentials.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—TAXES are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may properly be regarded as due process of law if it conforms to customary usages.

CONSTITUTIONAL LAW—LEGISLATIVE QUESTIONS, WHAT ARE.—The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one, where it is conceded that the use for which the right is sought to be exercised is a public use.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LEGISLATIVE QUESTIONS.—The legislative authority has a perfect right without any notice to the parties to be affected by its action, to open up a street and to determine the district to be affected thereby and made chargeable therefor.

CONSTITUTIONAL LAW—NOTICE SUFFICIENT TO SUPPORT PROCEEDINGS FOR OPENING A STREET AND TAKING PROPERTY THEREFOR.—A notice published in a newspaper that the board of supervisors have passed a resolution of intention (giving its number and date), stating the intention of the board to open a designated street, from its present termination, in a southwesterly direction, to the waters of the Pacific ocean, within the boundaries of the city and county named therein, and that all parties interested are referred to said resolution for further particulars, is as specific and certain as is practicable under the circumstances, and is sufficient. To require such notice to name all the persons to be affected and to be served upon them personally would require an impossibility.

CERTIORARI will lie to review and annul the proceedings of a board of supervisors in opening a street and designating lands to be taken therefor if the order of such board purports to condemn, appropriate, acquire, set apart, and take for public use the lands therein described, because such order goes beyond the legislative function of declaring the street an open and public one, and employs language appropriate to courts in proceeding to the final condemnation of land in the exercise of the power of eminent domain.

A LEGISLATIVE ACT IS one which predetermines what the law shall be for the regulation of future cases falling within its provisions, while a judicial act is a determination of what the law is in relation to some existing thing done or happened.

CONSTITUTIONAL LAW.—BOARDS OF SUPERVISORS, CITY COUNCILS, AND THE LIKE BOARDS AND COMMISSIONS may, under the constitution of California, be invested with powers belonging to either or all of the three departments of government.

PETITION for a writ of review of the proceedings of the board of supervisors of the city and county of San Francisco, taken with a view to opening and extending Market street in that city. The proceedings in question, as shown by the petition, commenced with a resolution of intention, number 4131 (third series), adopted by the board of supervisors October 13, 1890, in which that board declared its intention to open and extend Market street in said city from its present terminus in a southwesterly and westerly direction to the waters of the Pacific ocean, within the boundary of said city, and to condemn and acquire for public use a strip of land one hundred and twenty feet in width, and within the boundaries

of the street as so extended. The land deemed necessary for such extension was specifically described, as were the exterior boundaries of the district of the land to be affected and benefited by the work of improvement and to be assessed to pay the damages, costs, and expenses thereof. The notice of the resolution and proposed improvement was published in a newspaper for the time prescribed by statute, and was as follows:

"Public notice is hereby given that the board of supervisors of the city and county of San Francisco passed on the thirteenth day of October, 1890, a resolution of intention, No. 4131 (third series), stating the intention of said board to order the opening and extension of Market street, from its present termination, in a southwesterly and westerly direction, to the waters of the Pacific ocean, within the boundaries of said city and county. And all parties interested are referred to said resolution No. 4131 (third series) of the board of supervisors for further particulars.

"THOMAS ASHWORTH,
"Superintendent of Public Streets, Highways, and Squares.
"By E. OWENS,
"Deputy."

The final order of the board declared Market street to be an open, public street from its present termination running thence in the direction and for the width specified in the resolution of intention, and further declared that "the said street as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein and now held by the city and county as open public streets or highways." The statute under which the proceedings in question were conducted declared what whenever the public interest or convenience should require, the city council of any municipality should have full power and authority to order the opening, widening, extending, straightening, or closing, in whole or in part, of any street; that before ordering any work to be done the city council should pass a resolution declaring its intention to do so, describing the work or improvement, the land necessary to be taken therefor, and the exterior boundaries of the district to be affected or benefited by the work and to be assessed to pay the damages, costs, and expenses thereof; that a notice should be posted along the line of the contemplated work, stating the fact of the passage of the

resolution, its date, and briefly the work or improvement proposed, and referring to the resolution for further particulars; and that the notice should also be published for the period of ten days in one or more daily newspapers, that any person interested might make written objections within ten days after the expiration of the publication of the notice, and that all persons who so objected should be notified of the time, which should be fixed by the board for hearing the objections, and that at the time so fixed the city council should hear the objections, and its decision thereon should be final and conclusive, and that having acquired jurisdiction, as provided in the statute, the city council might order the work done and appoint commissioners to assess the benefits and damages; that after the commissioners made their report, it should be filed with the clerk of the city council, who should give notice of such filing by publication, which notice should require all persons interested to show cause, if any, why the report should not be confirmed, that all objections to the report should be in writing, that a time should be fixed for a hearing thereof and the objectors notified of such time, and that at the time so fixed the board should proceed to pass upon the report and might confirm, correct, or modify the same, or order commissioners to make a new assessment.

J. C. Bates and A. C. Freeman, for the appellant.

Pierson and Mitchell, for the respondent.

[17] THE COURT. The appellant here filed his petition in the court below to obtain a writ of review under section 1068 of the Code of Civil Procedure, to annul a certain order of the board of supervisors of the city and county of San Francisco (a copy of which marked "Exhibit C" is made a part of the petition), which purported on its face to take and condemn petitioner's land, with that of many others, for an alleged public use, in the extension of Market street in a general southwesterly direction from its present terminus to the Pacific ocean.

The order sought to be brought under review follows the resolution of intention of the board (which is also set out at length in the petition and marked "Exhibit A"), and the portion thereof against which the objections of petitioner are more particularly directed is as follows:

"SECTION 1. Market street is hereby declared to be an open public street of the city and county of San Francisco, from

its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly, with a uniform width of one hundred and twenty feet to low-water mark of the waters of the Pacific ocean.

"The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands included therein, and now held by the city and county as open public streets or highways."

The petition avers that no compensation was made to petitioner for his land taken, and also that it is not, and never has been, for the public use or convenience, or necessary thereto, to open or extend said Market street, and specifies reasons for this conclusion.

An order requiring defendant to show cause why a writ of review should not be allowed issued, in answer [18] to which defendant appeared and for cause answered, "that the proceeding sought to be reviewed herein was not, and is not, a judicial act, but was and is a legislative act, and not the subject of review on a writ of *certiorari*."

Upon a hearing the court below sustained the position taken by defendants, and denied the writ, and dismissed the petition. From the judgment petitioner appeals.

It is admitted on all hands that *certiorari* does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions which are not judicial in their character: *People* v. *Oakland Board of Education*, 54 Cal. 375; *Myers* v. *Hamilton*, 60 Cal. 289; *Williams* v. *Supervisors of Sacramento County*, 65 Cal. 160; *Bixler* v. *Supervisors of Sacramento County*, 59 Cal. 698; *People* v. *Bush*, 40 Cal. 344.

At the oral argument much stress was laid by counsel for appellant upon the insufficiency of the notice provided by the statute to be given to the owners of property to be affected by the improvement.

The position taken was not that the notice must be due process of the law in the strict sense of the term, as defined in proceedings taken in the courts, but that it must be its equivalent, with only such modification as the nature of the proceedings and the surroundings render necessary. Justice Bradley, in discussing what is due process of law in *Davidson* v. *New Orleans*, 96 U. S. 97, uses the following language:

"In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case it will be adjudged to be due process of law; but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

In commenting upon the above quotation in *Lent* v. *Tillson*, 72 Cal. 414, Temple J., says: "In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in [19] hand. And further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practicable or usual."

In the present case, the statute of March 6, 1889 (Statutes 1889, p. 70), under which the proceedings were taken, requires that before ordering any work done or improvement made, as authorized by section 1 of the act, the city council shall pass a resolution of intention to do the work or make the improvement, describing the work or improvement and the land deemed necessary to be taken therefor, and specifying the boundaries of the district to be affected or benefited by the improvement, and to be assessed to pay expenses. Notices are required to be posted upon the contemplated improvement not more than three hundred feet apart, and not less than three in any case, which shall be headed in letters of not less than one inch in length, "Notice of Public Work," and shall contain notice of the passage of the resolution of intention, its date, and briefly the work or improvement proposed, "and refer to the resolution for further particulars."

A like notice is required to be published for ten days in a daily newspaper (if any) published and circulated in the city where the work is to be done, etc. Within ten days after completion of publication, all parties in interest objecting may file their objections, when a day for hearing their objections must be fixed, the parties objecting notified, and a hearing had, and if the objections are sustained, all proceedings are stopped; if overruled, or if no objections are filed, the council is deemed to have acquired jurisdiction to order the work done or improvement made.

The notice was given by posting and publication as prescribed by the statute.

The terms "due process of law" or "due course of law" or "law of the land," all of which signify the same thing, are [20] sometimes defined as "law in its course of administration through courts of justice."

As applied to judicial proceedings, this definition is concise and precise, but in a broader sense the term signifies such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Administrative process, it has been said, of the customary sort, is as much due process of law as judicial process. To settle the question, as applied to a given state of facts, we have but to examine the previous condition of things in use, and regarded as essential to the protection of the rights of the individual under such circumstances, and if, in substantial compliance with such essentials, the course prescribed may be said to be in consonance with the law of the land, and to constitute due process of law.

The power of taxation is confided to the legislative department of the government and "an act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. It is, therefore, the law of the land not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation": Cooley on Taxation, 48, 49. It was said in *Kelly* v. *Pittsburgh*, 104 U. S. 80: "Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been due process of law."

The burden sought to be laid upon property holders in this case is not, it is true, taxation in the strict sense of the term: *Hagar* v. *Supervisors of Yolo*, 47 [21] Cal. 234. It is an assessment for a local, for a municipal, improvement which is sought in the proceedings under review; but in principle it is, in

most respects, subject to like considerations with cases of taxation.

The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one. Its determination rests exclusively with the legislature, or with such subordinate legislative bodies as it may be properly devolved upon, and the question of whether the exercise of the power is wise or not is one with which the judicial department has no concern. The question as to whether a given use is in fact a public use may be inquired into by the courts, but that question determined in the affirmative, as it must be here, and the power of the court is confined to seeing to it that the burdens cast upon the citizen are in conformity with the methods prescribed by the legislature and that those methods are not in conflict with the fundamental rights of the people: *Gilmer* v. *Lime Point*, 18 Cal. 257; *Contra Costa etc. R. R. Co.* v. *Moss*, 23 Cal. 324; *Davies* v. *Los Angeles*, 86 Cal. 37; *In re Fowler*, 53 N. Y. 62; *People* v. *Smith*, 21 N. Y. 595.

In the case last cited it was said: "The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute, which shall at once designate the property to be appropriated and the purpose of the appropriation, or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public is interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority."

[22] We think the consensus of opinion, the weight of authority, is to the effect that in a case like the present the legislative authority would have a perfect right, without any notice to the parties to be affected by its action, in the absence of a statute requiring notice, to open up Market street, and determine the district to be affected thereby, the latter of which was done and upheld in the case of the widening of Dupont street: *Lent* v. *Tillson*, 72 Cal. 404. In that case it

was said, in substance, that the parties affected had no constitutional right to be heard until the assessment was made.

The notice in the present case is made necessary by the act under which the council received its authority, and was in accord with the requirements of the act, and was as specific and certain as is practical under such circumstances, and was substantially such as has been approved in many cases in this state and elsewhere. To require such a notice to name all the persons to be affected, and to be served upon them personally, would, for a variety of reasons, require an impossibility.

We are of opinion, therefore:

1. That the proceedings of the council in passing the resolution of intention and in declaring the exterior boundaries of the district to be affected by the contemplated improvement were legislative in character.

2. In matters of taxation and assessment the state is not bound to accord personal service of process upon the citizen.

3. That the notice and the mode of its service was in obedience to the requirements of the statute, and not violative of any inherent or constitutional right of the persons to be affected thereby, and hence in accord with the law of the land, and amounted to due process of law in such a case.

No objections were filed, so far as appears, to the improvement or to the extent of the district of lands to be affected or benefited by such improvement, hence, under section 4 of the act, the council "is to be deemed to [28] have required jurisdiction to order any of the work to be done or improvements to be made."

Thereupon the city council passed the ordinance set out in the transcript, and marked C, which it is claimed by appellant was the exercise of judicial power, and in excess of the jurisdiction conferred upon the city council by the act of March 6, 1889.

That order or ordinance (Order No. 2319) purports to be an order for "opening and extending Market street from its present termination in a southwesterly and westerly direction to the Pacific ocean." By section 1, "Market street is declared to be an open public street of the city and county of San Francisco, from its present termination at its intersection with Castro and Seventeenth streets, thence southwesterly and westerly with a uniform width of one hundred and

twenty feet to low-water mark of the waters of the Pacific ocean."

The said street, as extended, embracing all the land included in the boundaries hereinafter described, is hereby condemned, appropriated, acquired, set apart, and taken for public use, except those portions of said lands "included therein and now held by the city and county as open public streets or highways, to wit": Then follows a description of the proposed street.

Section 2 names and appoints three commissioners to assess the benefits and damages resulting from the opening and extending the street, as provided for in resolution of intention, and to have and exercise general supervision of the proposed work and improvement until the completion thereof pursuant to the provisions of an act of the legislature, etc., describing the objects of the act approved March 6, 1889: Stats. 1889, p. 70, etc.

The question presented is: 1. Was the act of the board of supervisors judicial in its character and effect? and if so,

2. Was it in excess of the jurisdiction conferred upon the board?

The passage of ordinary resolutions for opening [24] streets in cities by the board of supervisors or city council, under the authority conferred by the act of March 6, 1889, and providing for commissioners, etc., is clearly, we think, a legislative act. A legislative act is said to be one which predetermines what the law shall be for the regulation of future cases falling under its provisions, while a judicial act is a determination of what the law is in relation to some existing thing done or happened: *Mabry* v. *Baxter*, 11 Heisk. 682; *Sinking Fund cases*, 99 U. S. 761.

In the case last cited it was said: "Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions.

"Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate to raise a specific sum to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment

of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts, which could not be performed by the legislature": *Lane* v. *Dorman*, 3 Scam. 238; 36 Am. Dec. 543.

Whenever an act determines a question of right or obligation or of property as the foundation upon which it proceeds such an act is to that extent judicial.

The order in question went beyond the legislative function of declaring a street an open and public one. It purported to and condemned, appropriated, acquired, set apart, and took for public use all the land within the exterior boundaries of the street, except that already held by the city.

To condemn land is to set it apart or appropriate it for public use. To appropriate is to make a thing one's own, to make it the subject of property, to exercise dominion [25] over an object to the extent and for the purpose of making it subserve one's own proper use or pleasure. To acquire is, in the law of contracts and descents, to become the owner of property; to make property one's own.

"To take, signifies to lay hold of, and when applied to land implies to gain or receive into possession; to seize; to deprive one of the possession; to assume ownership. Thus it is a constitutional provision that a man's property shall not be taken for public uses without just compensation": Black's Law Dictionary, tit. Take.

The terms used in this order are the usual and apt ones made use of in proceedings in the courts for the final condemnation of land under the exercise of the power of eminent domain. They are not the usual expressions made use of in the exercise of legislative power; the jurisdiction of the board conceded, and the terms used, were sufficient to divest the title of the petitioner and vest it in the public, to appropriate the property to a public use. It was the exercise of judicial power. It will not do to say that the board of supervisors had no such power, and therefore we must presume that in the order they merely intended their action as preliminary to proceedings to condemn, should they become necessary.

The order in question speaks in no uncertain terms. It uses language capable of only one interpretation, and that as showing an intent to condemn the land indicated *in præsenti*.

The order included not only a legislative expression of the will of the board adopting it that a street should be opened,

but in addition thereto sought to perform the judicial act of taking the land of citizens, rendered necessary under the legislation involved in the order. To the extent which it sought to accomplish this last object it was judicial.

As to the action of the board, so far as judicial, being in excess of its jurisdiction, we entertain no doubt.

It is true that boards of supervisors, city councils, [26] and like local boards and commissions are not within the inhibition of section 1 of article 3 of our state constitution, and may be invested with powers belonging to either or all of the three departments of our government: *People* v. *Supervisors*, 8 Cal. 60; *People* v. *Provines*, 34 Cal. 532; *Kimball* v. *Supervisors*, 46 Cal. 19. The objection to that portion of the order is not simply that it seeks to exercise judicial power, but that it involves an exercise of such power not conferred by any statute, and in a manner which no statute can authorize. When land within a street is "condemned, appropriated, acquired, set apart, and taken for public use," it would seem that the last act in the series essential to vest in the public a right to its use as a thoroughfare is accomplished.

It is evidence not of an intention to take and condemn the land in the future as provided in the statute we have referred to, but of a present condemnation, segregation, and dedication to the use of the public.

It follows from these views that the court below erred in holding that the Order No. 2319 was and is not a judicial act, and the judgment of the court below is reversed and the cause remanded.

BEATTY, C. J. I concur in the judgment.

Rehearing denied.

DUE PROCESS OF LAW.—DEFINITION: See the extended notes to *Bardwell* v. *Collins*, 20 Am. St. Rep. 554; *Bank* v. *Cooper*, 24 Am. Dec. 538; *Embury* v. *Conner*, 53 Am. Dec. 337. "Due process of law" is the right of trial according to the process and proceedings of the common law, or law in its regular course of administration through courts of justice: *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529, and note: *Rison* v. *Farr*, 24 Ark. 161; 87 Am. Dec. 52.

DUE PROCESS OF LAW.—ASSESSMENT OF TAXES WITHOUT NOTICE: See the extended notes to *Flint River Steamboat Co.* v. *Foster*, 48 Am. Dec. 278, and *Bardwell* v. *Collins*, 20 Am. St. Rep. 555.

EMINENT DOMAIN—RIGHT TO EXERCISE QUESTION FOR LEGISLATURE.—Whether an enterprise is of such public utility as to justify a resort for its furtherance to the exercise of the power of eminent domain is for the legislature to determine. Primarily the judiciary has no concern in such a mat-

ter: *Tidewater Co.* v. *Coster*, 18 N. J. L. 518; 90 Am. Dec. 634, and note; *Aldridge* v. *Tuscumbia etc. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307; *Beekman* v. *Saratoga etc. R. R. Co.*, 3 Paige, 45; 22 Am. Dec. 679, and extended note at page 692; *Varick* v. *Smith*, 5 Paige, 137; 28 Am. Dec. 417, and note. See the extended note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 142.

TAXATION—EXERCISE OF QUESTION FOR LEGISLATURE.—The power of taxation is vested exclusively in the legislature unless limited by some constitutional provision: *People* v. *Mayor*, 4 N. Y. 419; 55 Am. Dec. 266, and extended note; *Anderson* v. *Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63, and note; *Sharpless* v. *Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759; *Battle* v. *Mobile*, 9 Ala. 234; 44 Am. Dec. 438; *Tidewater Co.* v. *Coster*, 18 N. J. L. 518; 90 Am. Dec. 634; *Standard etc. Cable Co.* v. *Attorney General*, 46 N. J. Eq. 270; 19 Am. St. Rep. 394, and note. The power to tax is not a judicial power: *Board of Commissioners* v. *Northern Pac. R. R. Co.*, 10 Mont. 414. Whether particular property will be benefited at all, and to what extent it should be locally assessed are purely political questions with which the legislature is competent to deal, and the determination of these questions should be left to its wisdom and discretion: *Munson* v. *Commissioners*, 43 La. Ann. 15. See, further, the note to *Hill* v. *Higdon*, 67 Am. Dec. 296.

Questions Reviewable upon Certiorari.

The Office of the Writ of Certiorari has been so modified by statutes and judicial decisions in the United States that it is now difficult, if not impossible, to make any general statement of its scope or purpose or of the questions reviewable by it, which can be accepted as correct in any particular state without first resorting to local statutes and decisions to see how far they have modified the common law upon the subject. The one point of view in which, however, all the courts concur is that the purpose of the writ is to review none but judicial or *quasi* judicial acts, and that it can in no case extend to the questioning or annulling of acts which are ministerial, legislative, or executive, but when we come to consider the dividing line between judicial and other acts we shall find it so dimly outlined that there is much divergence of judicial opinion respecting its exact location.

On the one hand are the statutes and decisions confining the operation of the writ to annulling the proceedings of courts and *quasi* judicial tribunals only when they have acted without, or in excess of, jurisdiction, and on the other, statutes and decisions extending such operation to reviewing and correcting errors which in other states are reviewable only on appeal or by writ of error, and even supplying, or, in effect, reviving, these appellate remedies when the law has failed to create them or they have been lost by the excusable inaction or neglect of the applicant.

"*At the Common Law the Writ of Certiorari is Used* for two purposes: 1. As an appellate proceeding for the re-examination of some action of an inferior tribunal; and 2. As ancillary process to enable the court to obtain further information in respect to some matter already before it for adjudication": *United States* v. *Young*, 94 U. S. 258. "The writ of *certiorari*, when its object is not to remove a cause before trial or to supply defects in the record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error": *Harris* v. *Barber*, 129 U. S. 366. Until very recently this writ was issued by the supreme court of the United States

"as an ancillary process only, to supply imperfections in the record of a case already before it; and not like a writ of error to review a judgment of an inferior court": *American Construction Co.* v. *Jacksonville etc. R. R. Co.*, 148 U. S. 372; *United States* v. *Young*, 94 U. S. 258. By the act of Congress, establishing a court of appeals enacted March 3, 1891, in any case made final in the circuit court of appeals it is competent for the supreme court of the United States to require by *certiorari* or otherwise such case to be certified to the last-named court for its review and determination with the same power and authority as if such case had been taken there by appeal or writ of error. Under this statute, the supreme court may at any stage of the proceedings require them to be certified to it for review and determination "as the exigencies of each case may require": *American Construction Co.* v. *Jacksonville etc. R. R. Co.*, 148 U. S. 372.

Absence of Other Adequate Remedy.—It is very generally true that this writ lies only when there is no other adequate remedy: *Woodin* v. *Phœnix*, 41 Mich. 655; 32 Am. Rep. 172; *Auzerais* v. *Superior Court*, 101 Cal. 542. Therefore, when there is a new or summary jurisdiction created, the proceedings so authorized, whether in a court or not, if of a judicial, or *quasi* judicial, character and not subject to review by writ of error nor by appeal, may be removed to and reviewed by a superior court by virtue of this writ: *Ex parte Tarlton*, 2 Ala. 35; *Appeal of Commissioners*, 57 Pa. St. 452; *Commonwealth* v. *Ellis*, 11 Mass. 466; *Matthews* v. *Matthews*, 4 Ired. 155; *State* v. *Bill*, 13 Ired. 373; *Ruhlman* v. *Commonwealth*, 5 Binn. 24; *Tierney* v. *Dodge*, 9 Minn. 166; *Phillips* v. *Phillips*, 8 N. J. L. 122; *Walpole* v. *Ink*, 9 Ohio, 142; *Bob* v. *State*, 2 Yerg. 173; *Mackaboy* v. *Commonwealth*, 2 Va. Cas. 270; *Bath Bridge etc. Co.* v. *Magoun*, 8 Me. 293; *Williamson* v. *Carnan*, 1 Gill & J. 196; *State* v. *District etc. Society*, 35 N. J. L. 200; *Ex parte Couch*, 14 Ark. 337; *Derton* v. *Boyd*, 21 Ark. 264; *Camden* v. *Bloch*, 65 Ala. 236; *Ex parte Boynton*, 44 Ala. 261; *Appling* v. *Bailey*, 44 Ala. 333; *Rogers* v. *Bennett*, 78 Ga. 707; *Perkins* v. *Superintendents of Poor*, 1 Mich. 504; *Faribault* v. *Hulett*, 10 Minn. 30; *Welch* v. *Van Auken*, 76 Mich. 464.

Purpose and Scope of Writ.—As to those cases where the scope of the writ has not been narrowed by statute, the rule maintained by the weight of authority is "that its office extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of, and all questions of irregularity in the proceedings, that is, of the question whether the inferior tribunal has kept within the boundaries prescribed by it the express terms of the statute law or well-settled principles of the common law": *People* v. *Board of Assessors*, 39 N. Y. 81.

Errors Otherwise Reviewable.—It follows from the rule that *certiorari* issues only when there is no adequate remedy at law that among the questions which cannot be presented by it, where this rule prevails, are included all those which in the particular case might have been reviewed by appeal, writ of error, motion for a new trial, or other appropriate proceeding of which the party might have availed himself either in the appellate court or in the court in which the action against him was taken, provided such court had jurisdiction of him and of the subject matter of the action or proceeding; nor can he maintain his claim to the writ on the ground that the time within which he might have appealed or otherwise sought redress has expired, unless, perhaps, where he can show that his failure to avail himself of the remedy which he might have pursued was not due to any negligence or fault on his part: *Pettigrew* v. *Washington Co.*, 43 Ark. 33; *Hickey* v. *Mathews*, 43 Ark. 341; *Ex parte Pearce*, 44 Ark. 509; *Morrison* v. *Emsley*, 53

Mich. 564; *Wyatt* v. *Burr*, 25 Ark. 476; *Payne* v. *McCabe*, 37 Ark. 318; *Harris* v. *Barber*, 129 U. S. 366; *Poe* v. *Marion Machine Works*, 24 W. Va. 517; *Meeks* v. *Windon*, 10 W. Va. 180; *Edgerton* v. *Green Cove Springs*, 18 Fla. 528; *Kaye* v. *Marin County*, 42 Cal. 252; *Reynolds* v. *Superior Court*, 64 Cal. 372; *McCue* v. *Superior Court*, 71 Cal. 545; *Witkowski* v. *Skalowski*, 46 Ga. 41; *Peacock* v. *Leonard*, 8 Nev. 84; *Bernstein* v. *Clark*, 87 Ga. 148; *Davis Co.* v. *Horn*, 4 G. Greene, 94; *O'Hare* v. *Hempstead*, 21 Iowa, 33; *Cedar Rapids etc. Ry.* v. *Whelan*, 64 Iowa, 694; *Ransom* v. *Cummins*, 66 Iowa, 137; *Garvin* v. *Gorman*, 63 Mich. 221; *State* v. *Coco*, 42 La. Ann. 408; *Farrell* v. *Taylor*, 12 Mich. 113; *Logue* v. *Clark*, 62 N. H. 184; *Summers* v. *Harrington*, 14 Or. 480; *Ramsey* v. *Pettengill*, 14 Or. 207; *Kearns* v. *Follansby*, 15 Or. 596; *Proback* v. *Huff*, 11 Or. 395; *Nevada C. R. Co.* v. *Landler County District Court*, 21 Nev. 410; *Seattle etc. R. Co.* v. *State*, 5 Wash. 807; *Weber* v. *Ryers*, 82 Mich. 177; *State* v. *Pownell*, 49 N. J. L. 169; *State* v. *Snedeker*, 42 N. J. L. 76; *Lewis* v. *Gilbert*, 5 Wash. 534; *Milliken* v. *Huber*, 21 Cal. 166; *People* v. *Betts*, 55 N. Y. 600; *Gaither* v. *Watkins*, 66 Md. 576; *Gregory* v. *Dixon*, 7 Wash. 27; *Trustees of Schools* v. *Shepherd*, 139 Ill. 114.

Though there is no right of appeal from an order alleged to be void, still it has been held that it cannot be annulled by *certiorari* if, when presented as a part of the record upon appeal, the court seeing it to be void may refuse to give it effect. Thus, where while a proceeding was pending upon appeal, the trial court made an additional finding therein for the purpose of having such finding made a part of the record on appeal, and the respondent claiming that during the pendency of the appeal, the trial court was without jurisdiction to take any further action in the case sought to annul the additional finding by *certiorari*, his proceeding was dismissed on the ground that, conceding his claim to be true, he had "a plain, speedy, and adequate remedy in due course of law, when the additional finding is presented here as part of the record on that appeal. If the superior court was without authority to make the finding complained of, such finding will be entirely disregarded as a part of the record on the appeal referred to": *Auzerais* v. *Superior Court*, 101 Cal. 542.

On the other hand it has been decided that the right to the writ of *certiorari* cannot be taken away except by express words of the statute, and therefore may exist concurrently with the remedy by appeal or writ of error: *New Jersey R. R.* v. *Suydam*, 17 N. J. L. 25; *May* v. *Executors of Campbell*, 1 Tenn. 61. Even where this rule prevails, we apprehend that the court by reason of its discretionary power to withhold the writ when not in furtherance of justice will refuse to issue it when it appears that a remedy by appeal existed of which the applicant did not choose to avail himself: *State* v. *Pownell*, 49 N. J. L. 169; *State* v. *Snedeker*, 42 N. J. L. 76.

In Tennessee the power of the judges to issue this writ has long been guaranteed by the constitution of the state: Tenn. Const. of 1796, art. 5, sec. 6; Tenn. Const. of 1870, art. 6, sec. 10; and the use of the writ is in that state more varied than elsewhere: *Mayor* v. *Pearl*, 11 Humph. 249, 252. Thus in the case last cited the court said: "From the earliest period in our judicial history the *certiorari* has had given to it a much more extended application than in England, and it has been used for purposes wholly unknown to the common law. It has been adopted with us as the almost universal method by which the circuit courts of general jurisdiction, both civil and criminal, exercise control over all inferior jurisdictions, however constituted and whatever their course of proceeding; as well where they have attempted to exercise jurisdiction not conferred as where there has been an irregular or

erroneous exercise of jurisdiction, and in criminal proceedings as well as in civil. Instead of restricting the use of the *certiorari* to proceedings of inferior courts whose proceedings are not according to the course of the common law, and where for that reason the writ of error will not lie, it is held that it lies to review the proceedings of all tribunals exercising jurisdiction under statutory regulations, whether in a summary way or by a mode of proceeding not according to the common-law rules." While the writ is in this state a proper and adequate remedy in all cases where appeals or writs of error cannot be prosecuted and is in many instances also available to obtain redress properly sought in other states only by writ of *audita querela; Barnes* v. *Robinson*, 4 Yerg. 186; *Rogers* v. *Ferrell*, 10 Yerg. 254; *Kelley* v. *Story*, 6 Heisk. 203; *Marsh* v. *Haywood*, 6 Humph. 210; *McGrew* v. *Reasons*, 3 Lea, 485; *Cooper* v. *Summers*, 1 Sneed, 456; *Burt* v. *Davidson*, 5 Humph. 425; yet it is not even there a concurrent remedy with appeal or writ of error, and, when either of these remedies exists, cannot be resorted to unless the applicant was deprived of his remedy by the oppressive or erroneous act of the court, or the willful or negligent act of the clerk, or the procurement, fraud, or connivance of his adversary, or some accident, or blameless misfortune: *McMurry* v. *Milan*, 2 Swan, 176; *Copeland* v. *Cox*, 5 Heisk. 171; *Smith* v. *White*, 5 Humph. 46; *Napier's Exr.* v. *Person*, 7 Yerg. 300.

In North Carolina also, while a right of appeal lost by laches cannot be revived by this writ *Cox* v. *Pruett*, 109 N. C. 487; *Badger* v. *Daniel*, 82 N. C. 468; *Skinner* v. *Maxwell*, 67 N. C. 257, the existence of this right does not deprive the applicant of relief by *certiorari*, if he can show a sufficient excuse for not resorting to the remedy by appeal: *Board of Commrs.* v. *Old Dominion S. Co.*, 98 N. C. 163; *Swaim* v. *Fentress*, 4 Dev. 601; *Dougan* v. *Arnold*, 4 Dev. 99; *Williamson* v. *Boykin*, 99 N. C. 238.

In West Virginia, in describing the scope of the writ in that state, the court said: "The use of this writ is now pretty well understood and its limits defined, though the practice is not the same in all jurisdictions. It is generally used in such cases as might otherwise without its intervention leave the party remediless. It is considered as an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding. Even in cases where the law has provided a remedy by writ of error or appeal, this writ may, under special circumstances, be invoked, as, for instance, if by the act of the court either oppressively or erroneously the writ of error or appeal is refused; or by connivance or procurement of the adverse party the same result is effected; or even by inevitable accident or misfortune without blame of the party injured he has been prevented from having a second investigation of the facts of the cause by the prescribed mode of a writ of error or appeal, *certiorari* may be resorted to as a substitute for redress": *Poe* v. *Machine Works*, 24 W. Va. 520.

Whether Errors of Law are Reviewable upon *certiorari* depends upon whether in the particular case and under the practice in the state in which it is presented for decision the writ may be regarded as a substitute for an appeal or writ of error. In some of the states, as we shall hereafter show, this writ can be employed only to test the jurisdiction of the lower court or other judicial or *quasi* judicial tribunal, and to annul its action when in excess of its jurisdiction, and where this practice prevails, it is not material whether the court committed errors of law or not, for, notwithstanding such errors, its action must stand if it had jurisdiction, and, on the other hand, must fall if it had not jurisdiction, though in other respects its action was

correct: *Phillips* v. *Welch*, 12 Nev. 158. So, though the writ has not, by statute, been restricted to cases in which the court acted without jurisdiction, yet if a remedy existed by appeal or writ of error, by which any error of law could have been reviewed and annulled, the party claiming to be injured by such an error cannot, by failing to prosecute his appeal, present the alleged error for review by *certiorari*: *St. Louis etc. R. Co.* v. *State*, 55 Ark. 200; *Burgett* v. *Apperson*, 52 Ark. 213; *State* v. *Jefferson County Superior Court*, 6 Wash. 201. No error of the lower court not involving its jurisdiction and making its order or judgment absolutely void, and for which the injured party had an adequate remedy by appeal or writ of error, or other proceeding, can be urged or reviewed on *certiorari*, whether it be an error of law, as in admitting or rejecting evidence, reaching an erroneous conclusion from conflicting evidence, or proceeding in an irregular manner in any respect, or erroneously determining any motion presented to the court in the proceeding: *Ex parte Allston*, 17 Ark. 580; *Hill* v. *Steel*, 17 Ark. 440; *St. Louis etc. R. R.* v. *Barnes*, 35 Ark. 95. "A decision made according to the forms of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to the facts, is not an illegal or irregular act or proceeding remediable by *certiorari*": *Basnet* v. *Jacksonville*, 18 Fla. 523, 526. "Where the alleged errors of the justice go to the foundation of the action, it is proper to review them on *certiorari*; but where they occur in the course of the trial and are of such a nature that they might be obviated on a new trial, the new trial is obviously the proper remedy. The writ of *certiorari* is not given to enable parties to have a technical review of all the justice's rulings, but to afford a speedy and inexpensive remedy for substantial faults, and where the case is one to be determined on disputed facts, the party dissatisfied with the judgment should remove it to the circuit court for trial on the facts instead of seeking a reversal on technical grounds without an investigation of the merits": *Erie Preserving Co.* v. *Witherspoon*, 49 Mich. 377, 379.

If the effect of the writ has not been restricted by statute, there is little doubt that in all cases where it may properly issue, it brings before the court substantially the same questions which might have been presented on an appeal or writ of error, and authorises and requires the superior court, when in its judgment substantial justice can be promoted, thereby to consider all errors of law occurring in the course of proceeding, whether of the admission or rejection of evidence, or the drawing of conclusions not sustained thereby, or of granting relief not warranted by the facts found, or denying relief so warranted, or in any other matter, ruling, or decision substantially affecting the rights of the parties. The correct rule has been thus clearly and tersely expressed by the supreme court of Minnesota: "It has heretofore been determined in a case of this kind, when the court acts in a summary manner, or in a new course, different from the common law, in the absence of legislative restriction, the *certiorari* lies, and that the effect of the writ in such a case is to bring before this court, for examination and revision, the record, or proceedings in the nature of a record, the rulings of such inferior tribunal upon the admission or rejection of testimony, the instructions given and refused to the jury, with the exceptions taken together with so much of the evidence as may be proper to show the bearing of such rulings and instructions and prejudice of the petitioner": *City of St. Paul* v. *Marvin*, 16 Minn. 102, 104. "Whatever may have been the conflict of authority heretofore upon the question, whether upon common-law *certiorari* the court can inquire into any thing beyond the jurisdiction of the tribunal over the parties

and subject matter, it must now be regarded as settled in this state, that it is the duty of the court, in addition thereto, to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated": *People* v. *Smith*, 45 N. Y. 773, 776.

Discretion Cannot be Reviewed.—As is well known when a court is invested with the exercise of a discretionary power or authority, such discretion, while not altogether free from review in an appellate tribunal, is not subject to such review to the same extent nor in the same sense as are errors of law. On the contrary the discretion confided to the court is not reviewable on appeal or otherwise except to correct what might properly be deemed a clear and manifest abuse thereof. With respect to proceedings by *certiorari* there is no doubt that the fact that an act is discretionary and that in the exercise of the discretion, judgment must be employed, does not prove that it is judicial and therefore subject to review: *People* v. *Walter*, 68 N. Y. 403; *People* v. *Board of Commrs.*, 97 N. Y. 37; *People* v. *Kelly*, 24 N. Y. 74; and even when the act is conceded to be judicial or *quasi* judicial, if it was also discretionary, it cannot be reviewed or set aside on *certiorari*, for at most, the action complained of is a mere error of judgment, and not a violation of any established rule of law, statutory or otherwise: *Commissioners* v. *Kane*, 2 Jones, 288; *Ketchum* v. *Superior Court*, 65 Cal. 494; *Tiedt* v. *Carstensen*, 61 Iowa, 334; *State* v. *Busby*, 44 N. J. L. 627; *Livingston* v. *Rector of Trinity Church*, 45 N. J. L. 230, 238.

Questions of Fact are rarely, if ever, reviewable upon *certiorari*. Even where this writ has the effect of a writ of error or appeal and brings before the superior court the evidence upon which the action or judgment of the inferior court or tribunal was based, the rules applicable to other appellate proceedings prevail, and the decision of the judge, jury, or other tribunal upon any question of fact respecting which the evidence was conflicting will not be disturbed: *Rawson* v. *McElvaine*, 49 Mich. 194; *Town of Camden* v. *Bloch*, 65 Ala. 236. "The writ of *certiorari* lies only to correct errors of law, and not to revise the decision of a question of fact upon evidence introduced at the hearing in the inferior court or to examine the sufficiency of the evidence to support the finding, unless objection was taken to the evidence for incompetency so as to raise a legal question": *Farmington etc. Co.* v. *County Commrs.*, 112 Mass. 206, 212; *Nightingale's case*, 11 Pick. 168. As is the case in other appellate proceedings, the mere erroneous reception or rejection of evidence does not necessarily entitle a complaining litigant to a reversion or vacation of the judgment, but the whole record will be examined, and if, considered as a whole, it does not appear therefrom that substantial justice was not done him, the assailed proceeding will be sustained, though some errors occurred during its progress: *Cobb* v. *Lucas*, 15 Pick. 1; *Gleason* v. *Sloper*, 24 Pick. 181. "The office of the common law *certiorari* has been very much enlarged by the later decisions in this state, but there is no authority holding that questions of fact from conflicting evidence or conflicting inferences which may be drawn from facts or matters of judgment or discretion in the case justifying their exercise can be reviewed. Only errors of law affecting materially the rights of the parties may be corrected and the evidence may be examined in order to determine whether there is any competent proof to justify an adjudication made": *People* v. *Board of Police*, 69 N. Y. 408, 411; *People* v. *Board of Police etc.*, 39 N. Y. 506; *People* v. *Board of Police etc.*, 72 N. Y. 417; *State* v. *Whitford*, 54 Wis.

150. It is a fair summary of the decisions upon this topic to say that in those states in which the evidence may be brought before the superior court upon *certiorari* that court may examine it, not for the purpose of determining the credibility of witnesses or the weight to be given conflicting testimony, but solely for the purpose of determining whether, from competent evidence before it, the decision of the inferior court is sustainable, and, if so, such decision cannot be set aside as against or not supported by the evidence, and, on the other hand, if there was no competent evidence to sustain such decision, it must be annulled: *State* v. *Duluth*, 53 Minn. 238; 39 Am. St. Rep. 595; *Callon* v. *Sternberg*, 38 Wis. 539; *Jackson* v. *People*, 9 Mich. 111; 77 Am. Dec. 491; note to *Duggen* v. *McGruder*, 12 Am. Dec. 533; *Keenan* v. *Goodwin*, 17 R. I. 649; *Commonwealth* v. *Gillespie*, 146 Pa. 546; *State* v. *Mayor of Hudson*, 32 N. J. L. 365, 367; *Conover* v. *Davis*, 48 N. J. L. 112; *State* v. *Bill*, 13 Ired. 373.

Extrinsic Evidence—The Questions Must Arise on the Record.—No questions can be presented for review upon *certiorari* other than those which arise on the record, save and except that the court may sometimes hear evidence in support of the record for the purpose of showing that substantial justice has been done, or that for some reason the discretion which the court has to deny relief by this writ ought to be exercised and the petitioner left to such other means of redress as he may have, but it is clear in the absence of statutory authority, that the record cannot be contradicted by extrinsic evidence, and that the petitioner's cause must be determined on the record alone: *Richardson* v. *Smith*, 59 N. H. 517; *Alexander* v. *Archer*, 21 Nev. 22; *North* v. *Joslin*, 59 Mich. 624; *Matthews* v. *Otsego County*, 48 Mich. 587; *In re McCandless Turnpike Road*, 110 Pa. St. 605; *Deer* v. *Commrs. of Highways*, 109 Ill. 379; *Hyslop* v. *Finch*, 99 Ill. 171; *Ex parte Madison Tp. Co.*, 62 Ala. 93; *Camden* v. *Bloch*, 65 Ala. 236; *Dicus* v. *Bright*, 23 Ark. 107; *Brown* v. *Roberts*, 23 Ill. App. 461; *Commissioners of Highways* v. *Newby*, 34 Ill. App. 378; *State* v. *New Orleans Judge*, 36 La. Ann. 977; *De Pedrorena* v. *Superior Court*, 80 Cal. 144; *Case* v. *Frey*, 24 Mich. 251; *Mendon* v. *Worcester*, 5 Allen, 13; *Bradford* v. *Goshen*, 57 Pa. St. 495; note to *Morrill* v. *Morrill*, 23 Am. St. Rep. 108. In other words, the record imports absolute verity when the proceeding is assailed by *certiorari:* Note to *Morrill* v. *Morrill*, 23 Am. St. Rep. 108; *In re Dance*, 2 N. Dak. 184; 33 Am. St. Rep. 768.

There may be embarrassment in determining what the record is, and doubtless the statutes in many of the states have enacted conflicting rules upon this subject, but it is one which does not permit of any extended examination in this note. If the court to which the writ issues is a court of record, there can be but little difficulty in determining what documents or other papers constitute its record; and these only can be considered, though other matters are disclosed by the return. If the evidence received has not been preserved in such a manner as to constitute a part of the record in the lower court, it must be excluded from consideration in the superior court, though the judge or some other officer has certified to it, and thus attempted to make it a part of the return to the writ. In the great majority of cases in which redress is sought by this writ it is directed to inferior courts or tribunals exercising a limited or summary jurisdiction having no record. In such cases perhaps the most usual practice is to require such court or tribunal, by its clerk or otherwise, to certify the proceedings taken before it and its action thereon, as well as to furnish copies of such petitions and other papers as have been presented to it and made a basis of its right to act, together with a statement of its rulings upon any point in

which it is claimed to have acted erroneously to the prejudice of the applicant: *Farmington etc. Co.* v. *County Commrs.*, 112 Mass. 206.

In a few of the states the remedy by *certiorari* is restricted to questions of jurisdiction only, and the writ must be denied in every case unless the proceeding, judgment, or order sought to be reviewed or some part of it, was beyond the jurisdiction of the court or other judicial tribunal. In other words, a decision upon *certiorari* in favor of the applicant amounts only to a judicial declaration that some action taken in an inferior court or tribunal was absolutely void, and therefore might have been disregarded with impunity, even if its validity had never been assailed by this writ: *Reagan* v. *Justice's Court*, 75 Cal. 254; *Weimmer* v. *Sutherland*, 74 Cal. 341; *Phillips* v. *Welch*, 12 Nev. 158; *State* v. *Judge of Twenty-first Judicial District*, 45 La. Ann. 950; *State* v. *Koenig*, 39 La. Ann. 776; *State* v. *Riley*, 43 La. Ann. 177. In Wisconsin, when the writ issues to review the proceedings of a court, the only question examinable is in respect to its jurisdiction, but "it is otherwise when it issues to review the proceedings of officers and bodies not proceeding according to the course of the common law": *State* v. *Circuit Court*, 71 Wis. 595.

Contempt Cases.—The rule that on *certiorari* no question can be considered but the jurisdiction of the court is almost universally applicable to proceedings seeking to assail judgments inflicting punishment for alleged contempts of court. The general rule is that these judgments are not subject to review on appeal or writ of error. They may, however, be brought before a superior court by *certiorari*: *Lindsay* v. *District Court of Clayton County*, 75 Iowa, 509; *Ex parte Bigge*, 64 N. C. 202; *Young* v. *Cannon*, 2 Utah, 560; *Harrison* v. *State*, 35 Ark. 458; *Hummel's case*, 9 Watts, 416; *People* v. *Kelly*, 24 N. Y. 74; but the court does not inquire whether they are erroneous merely, but whether they are void. In other words, the only question is, Had the court jurisdiction to render the judgment assailed? *Vanvabry* v. *Staton*, 88 Tenn. 334; *State* v. *Galloway*, 5 Cold. 326; 98 Am. Dec. 404; *State* v. *Monroe*, 41 La. Ann. 314; note to *Mullin* v. *People*, 22 Am. St. Rep. 420; *Maxwell* v. *Rives*, 11 Nev. 213; *Ex parte Smith*, 53 Cal. 204; *Phillips* v. *Welch*, 12 Nev. 158; *'76 Land etc. Co.* v. *Fresno County Superior Court*, 93 Cal. 139. The case must, therefore, be heard upon the record alone, but if it appears therefrom that the acts of which the applicant was found guilty were lawful and proper under the circumstances, and could not constitute a contempt of court, or that the punishment inflicted was in excess of that which the court had power to impose, then the judgment may be annulled: *In re MacKnight*, 11 Mont. 126; 28 Am. St. Rep. 451; *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78. In a few of the states *certiorari* to a judgment punishing an alleged contempt of court is not restricted to mere questions of jurisdiction, but may review errors of law appearing from the record: *Ex parte Bigge*, 64 N. C. 202; *Commonwealth* v. *Newton*, 1 Grant Cas. 453; *Dunham* v. *State*, 6 Iowa, 254; or grant a reversal for a clear abuse of discretion: *Harrison* v. *State*, 35 Ark. 458.

What Questions are Judicial.—As already suggested, the authorities agree that *certiorari* does not lie to review or annul any judgment or proceeding which is not judicial in its nature, but with respect to various proceedings there is room for great difference of opinion as to whether they are judicial or not. If they are either legislative or executive, they are beyond the reach of this writ: *People* v. *St. Lawrence County Superior Court*, 25 Hun, 131; *Re Wilson*, 32 Minn. 145; *Spring Valley Water Works* v. *Bryant*, 52 Cal. 132; *Isbs* v. *Newton*, 54 Iowa, 586. While the functions of the three great depart-

ments of government are in most respects sufficiently dissimilar to avoid confusion as to the duties and powers resting upon each, it must be confessed that there are duties which are ordinarily committed to the legislative or executive departments that might properly be committed to the judicial, and there are subordinate tribunals which may be authorized to perform both legislative and judicial functions, and, as to an act of a tribunal possessing both legislative and judicial functions, it may not be possible to formulate any test of general acceptability by which to determine when the action is judicial, and therefore reviewable on *certiorari*, or is legislative, and therefore beyond the supervising power or control of the courts. Thus the power to remove officers is ordinarily devolved upon the executive, and when such is the case is properly classed as an executive function. The power of granting divorces, authorizing the sale of the property of infants or insane persons, or the adoption and legitimation of children, and the like, may be exercised by the legislature without any judicial inquiry or determination as to the necessity or propriety of the divorce, sale, adoption, or legitimation, and when such is the case is doubtless a legislative power. If, on the other hand, some law directs that officers may be removed for cause, or that the lands of infants or insane persons shall be sold when necessary for their support or education, or to otherwise promote their interests, or that children may be adopted when their welfare will be advanced thereby, and if the law further provides that some court, tribunal, or person shall have power to decide these questions, and that such decision shall not be given until the party to be affected thereby has had notice of the proposed proceeding and an opportunity to be heard with respect thereto, then it seems to us that the examination, hearing, and decision to be thereon made are judicial in character and consequence, and therefore subject to annulment, and to some extent, to review by the superior courts. This view, as we understand it, is sustained by the decisions in *State* v. *Graham*, 60 Wis. 395; *People* v. *Jones*, 112 N. Y. 606; and also by the following language from the opinion of the court in *Home Ins. Co.* v. *Flint*, 13 Minn. 247: "A judicial investigation proceeds after notice and eventuates in a judgment which is the final determination of the rights of the parties unless reversed by an appellate tribunal. The necessity of notice in the inception and the conclusive character of the determination are perhaps as good a test as any other as to what proceedings are judicial."

In the principal case the subject matter of the action by the board of supervisors related to the opening and extending of a public street, and there is no doubt that the legislature might have directly authorized such opening and extension, or have delegated the duty or power to authorize it to a subordinate legislative body, and without requiring it to have given any person affected any hearing whatever. In either event, the action would have been legislative in character, and not reviewable on *certiorari*. But what the law under consideration actually did was to require the supervisors to give notice of their intention to proceed and to accord a hearing to any or all persons interested, and it could not seriously be contended that any action taken without giving this notice would be of any validity whatever. Furthermore, the final action of the supervisors under the statute in question fixed the amount chargeable against each parcel of realty for the expenses of the proposed improvement; and this the legislature could not directly do. Our contention is, that an action is necessarily judicial if the parties to be affected thereby have a right both to notice of the proceeding and to a hearing in opposition to it, before some tribunal which is not other.

wise authorized to proceed, especially if the result of such action is to establish a liability against person or property; and if such contention is well founded, the court was mistaken in so far as it affirmed that the proceeding was purely legislative, and therefore not reviewable on *certiorari*. The opinion, taken as a whole, is difficult to understand; for, while it asserts that the action of the board of supervisors was legislative, and not reviewable by the courts, it dwells upon the fact that the notice given was such as was prescribed by statute, and was sufficient to constitute due process of law in the class of cases to which it was applied, and what the court might have meant to affirm may have been that jurisdiction being acquired in the mode prescribed by law, the subsequent determination as to the propriety of proceeding with the contemplated improvement, and the designation of the boundaries of the district to be chargeable therefor, were legislative in character, and therefore not subject to review.

When an act is sought to be reviewed on *certiorari*, and is claimed to be exempt from such review because it is of a legislative, or, at least, that it is not of a judicial, character, resort is frequently had to definitions formulated for the purpose of creating some test by which this vexed question can be determined. Of these definitions, perhaps, none is more terse and satisfactory than the following by Judge Field: "The distinction between a legislative act and a judicial act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law should be in future cases arising out of it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions": *Sinking Fund cases*, 99 U. S. 761.

Boards of Supervisors and Common Councils of Municipalities.—The chief contention respecting the office of the writ of *certiorari* has arisen when it was sought as a means of reviewing or annulling the proceedings of the common councils of towns or cities, or of the boards of supervisors and like tribunals exercising legislative, administrative, and judicial functions in the government of counties. We do not doubt that there are indefensible decisions on both sides of this question; some that have sustained the writ when the act reviewed was clearly administrative or legislative in character and consequence, involving neither judicial inquiry nor decision; and others, like the principal case, that have questioned the writ when the proceeding was required to be instituted by notice to all the parties to be affected thereby who were entitled to be heard in opposition thereto, and in the event of such opposition being overruled, a charge was imposed upon their property as the ultimate result of the proceeding, and the precise amount due from each parcel so fixed that it could not be the subject of further inquiry, judicial or otherwise. If an ordinance enacted or an act done by such a board is one which the legislature might have enacted or done directly without any judicial or *quasi* judicial inquiry or determination, then it is not judicial in character, and not reviewable on *certiorari*, unless, perhaps, when the legislature has expressly or impliedly prescribed that some investigation shall be conducted, and some determination made, and secured to the parties interested a right to be heard before the determination shall be made. Hence the courts will not review the action of a board of supervisors in adopting a resolution providing for the repair of certain public highways: *People* v. *Queens County Superior Court*, 131 N. Y. 468; or consenting to or contracting for the construction of a bridge: *People* v. *New York Park Commrs.*,

97 N. Y. 37. So an enactment of an ordinance of a legislative character, though its operation, if valid, may affect private interests, cannot be annulled by *certiorari*: *Ide* v. *Newton*, 54 Iowa, 586; *In re Wilson*, 32 Minn. 145; *Spring Valley Water Works* v. *Bryant*, 52 Cal. 132.

One of the functions of boards of the character here under consideration is considering, allowing, and rejecting claims made against a city and county, and the allowance of a claim generally establishes its validity. If the board exercises a discretion, or is to draw conclusions from conflicting evidence, the instances in which its action can be reviewed must be rare. In states like California, where *certiorari* cannot issue except when there is a want of jurisdiction, it is evident that the action of the board in allowing a claim cannot be reviewed on the ground that such claim was illegal, or that the board otherwise came to an erroneous conclusion respecting the claim, provided it had the right to act at all: *Andrews* v. *Pratt*, 44 Cal. 309. In other states the authorities indicate that if the action is one which the board had no right to take, as where it rejects a claim which its imperative duty requires it to allow (*People* v. *Supervisors*, 51 N. Y. 442), or allows a claim which cannot constitute a charge against the city or county (*People* v. *El Dorado*, 8 Cal. 58), *certiorari* is a proper remedy.

Proceedings for laying out, widening, or extending public highways and attempting to create charges against private persons or property for such an improvement have, contrary to the ruling in the principal case, been almost universally regarded as subject to *certiorari*, at least in those cases in which the persons to be benefited or prejudiced thereby had a right to a notice and hearing, either as to the advisibility of the contemplated improvement, or to the amount of charges which should be assessed against persons or property for the payment thereof: *Keys* v. *Marin County*, 42 Cal. 252; *State* v. *Ashland*, 71 Wis. 502; *Faust* v. *Huntsville*, 83 Ala. 279; *People* v. *Mayor of Brooklyn*, 9 Barb. 535; *Hall* v. *Pettit*, 88 Mich. 158; *Deitrick* v. *Bishop Township*, 6 Ill. App. 70; *Goodwin* v. *Hallowell*, 12 Me. 271; *Thompson* v. *Multnomah County*, 2 Or. 34; *Wilson* v. *Seattle*, 2 Wash. 543; *Matter of Carlton Street*, 20 Wend. 687; *Parks* v. *Boston*, 8 Pick. 218; 19 Am. Dec. 322; *Stone* v. *Boston*, 2 Met. 220; except when the statute has given some other remedy, and in effect made it conclusive: *People* v. *Myers*, 135 N. Y. 465.

If, on the other hand, the proceeding is one which is ministerial, and in which no person has a right to be heard, it is very rarely reviewable on *certiorari*: *Attorney General* v. *Northampton*, 143 Mass. 589, as in the rejecting of a bid for public work required to be let to the lowest bidder: *Townsend* v. *Copeland*, 56 Cal. 612; or vacating an order directing an assessment to be made in a reclamation district: *Bixler* v. *Sacramento County*, 59 Cal. 698. In New Jersey, however, the writ seems to be awarded irrespective of the question whether the action of the municipal board is judicial or not, if the applicant can show that he is prejudiced thereby: *State* v. *Robbins*, 54 N. J. L. 566; *Camden* v. *Mulford*, 26 N. J. L. 49; *Mowery* v. *Camden*, 49 N. J. L. 106; and in Maine it has been held that if county commissioners order an abatement of taxes without jurisdiction to do so, the writ is a proper remedy to annul their action: *Fairfield* v. *Commissioners*, 66 Me. 385.

The decision in *Williams* v. *Board of Supervisors*, 65 Cal. 160, though extremely brief, is apparently in full harmony with that in the principal case. By the statute of California, persons owning swamp or overflowed lands are permitted to make an application, in writing, to the board of supervisors of the county in which such lands are situate for the formation of a reclamation district, and such board, after giving notice of the time and

place of hearing, are authorized to hear the petition, and if they find that the lands are swamp and overflowed, and subject to one mode of reclamation, may approve the petition, and thereby form a reclamation district. The result of this approval is, in effect, an adjudication that the lands are of the character designated in the petition, and that it is proper to include them in the proposed district. In subsequent proceedings to collect assessments and the like, the landholders appear to be concluded by the action of the supervisors from denying that the lands are swamp and overflowed, and subject to the imposition of charges for the reclamation; and yet, though it was claimed that a petition which had been approved was entirely wanting in the requisite jurisdictional averments, and the approval was therefore assailed on *certiorari*, it was said, in reversing the judgment granting such writ, that "the order of the board of supervisors creating a district for the reclamation of swamp lands is an act of legislation in the exercise of the taxing or police powers of the state, which is not subject to *certiorari*": *Williams* v. *Board of Supervisors*, 65 Cal. 160.

In some of the decisions the very remarkable view is taken of the proceedings of local boards which are entirely beyond their power, and it is claimed that because such proceedings are absolutely and under all circumstances unauthorized, and therefore void, that they cannot be annulled by *certiorari*: *State* v. *Lamberton*, 37 Minn. 362; *Locke* v. *Selectmen*, 122 Mass. 290; *State* v. *Mayor of St. Paul*, 34 Minn. 250; whereas, it seems to us, that they constitute a class of cases in which the remedy by *certiorari* is especially proper. These decisions are in apparent conflict with that in the principal case, wherein the writ was sustained, not because the acts which the board were authorized to do were judicial, but because, being legislative only, the board was not authorized to use in respect to them language which was judicial in form. That part of the decision amounts to a determination that the writ of *certiorari* may be employed as a means of protection against the improper use of judicial language. If, as the court held, the board of supervisors was, as to the proceedings in question, not a judicial, but a legislative body, and, therefore, not subject to control by the courts, we cannot understand how they transformed themselves into a judicial body and rendered their proceedings judicial merely by the employment of language which is appropriate only to judicial action. To illustrate: If the legislature of a state, in a statute enacted by it, purported to order, adjudge, and decree, would such statute, or any part of it, be subject to annulment by *certiorari* because of the employment of such language?

There are several early cases in California in which writs of *certiorari* were sustained, though the boards to annul whose action they issued were apparently exercising functions as clearly legislative or administrative as those involved in the principal case. Thus the writ was maintained to annul the action of the board of supervisors in rejecting an official bond for a reason it was not authorized to consider: *Miller* v. *Supervisor*, 25 Cal. 93; in granting a ferry license without giving the notice prescribed by law: *Murray* v. *Supervisors*, 23 Cal. 492; or letting the county printing without any notice of their intention to do so, when the statute required such notice to be given: *Maxwell* v. *Supervisors*, 53 Cal. 389; and in enacting an ordinance, without authority of law, creating the office of assistant clerk of the board, and raising the salaries of certain other officers of the county: *Robinson* v. *Supervisors of Sacramento County*, 16 Cal. 208, in which the court reviewed the authorities then existing upon the subject, and expressed its conclusions in the following language: "The only difficulty we have experienced in the case is the

technical question of the remedy selected by the relators. It is argued for the defendants that *certiorari* will not lie in such a case; that this writ is limited to a review of judicial actions and proceedings by the inferior tribunals, and that this ordinance is a legislative act, and not of a judicial nature. We were strongly inclined, on the argument, to this view, but a further examination has led us to abandon it. When the term "judicial" is applied to the action of these boards, it is not to be received in the sense usually applied to courts of justice. Thus, Judge Bronson speaks, in *Supervisors etc.* v. *Briggs*, 2 Denio, 26, of the settlement and allowance of an account by the board as an adjudication of the matter by a proper tribunal, and therefore conclusive: See, also, *People* v. *Supervisors*, 9 Wend. 508. So in *Gillespie* v. *Brous*, 23 Barb. 378. In *People* v. *Mayor of New York*, 5 Barb. 45, the court say, there can be no doubt that a *certiorari* will lie to review the judicial acts of municipal corporations. That was admitted in the case of *In re Mount Morris Square*, 2 Hill, 14, cited by the defendant's counsel, and is in conformity with the decisions of the late supreme court in several antecedent cases: *Elmendorf* v. *Mayor of New York*, 25 Wend. 693; *Le Roy* v. *Mayor of New York*, 20 John. 430; 11 Am. Dec. 289. The authorities are equally clear that if the act complained of is simply ministerial it cannot ordinarily be reviewed on *certiorari*. Such was the ordinance of the common council for the construction of the sewer in question. That was a simple exercise of their ministerial, or, if I may use the expression, legislative, power. That, if authorized by their charter, which it clearly was, resolved itself into a question of expediency, solely for their consideration, and which cannot be reviewed here. But although the ordinance itself cannot, I think, be annulled by this court, yet it is competent for us, in a proper case, to vacate the assessment of the common council in affirming those proceedings, as they then acted in a judicial capacity. That may be, although they do not constitute an ordinary judicial tribunal. It is sufficient if they are invested by the legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially, whatever may be their public character. The defendants are authorized by the statute (2 Rev. Laws of 1813, sec. 175) to ratify the estimate and assessment when made and reported to them by the commissioners, and then the same became binding and conclusive upon the owners and occupants of, and constitute a lien upon, the lots on which the assessments are made. In ratifying these proceedings of the commissioners the defendants unquestionably act judicially. It is not simply the performance of an act of their own, but it is reviewing and deciding upon the conduct of others. The justices of this court in passing upon the proceedings of the commissioners, in street cases, exercise a similar power; and it has been frequently decided that their acts in such cases may be reviewed on *certiorari*. And if, in this case, the defendants have committed a mistake in confirming acts not authorized by the statute, whereby the rights of the citizen are prejudiced, their error may be corrected by this court. It would be intolerable to allow these corporations to proceed in the exercise of their numerous, and some of their arbitrary, powers without some corrective. It is true that where their acts are simply void the law will afford a remedy; but there are many cases where their acts would not be wholly nugatory, and yet they might be very oppressive; such, for instance, as adopting a wrong principle relative to assessments, by which a citizen might be subjected to a tax, who ought not to be taxed at all. There can be no doubt that if the estimate and assessment

were substantially erroneous, and ought not to have been ratified by the common council, they may be vacated by this court. In *Gillespie* v. *Broas*, 23 Barb. 378, it was held that chancery would not interpose where the supervisors had no power to select a site for a certain building, and where certain orders were issued without authority, but that *certiorari* was a proper remedy. In *Wildy* v. *Washburn*, 16 Johns. 49, it was decided that the appointment of a constable by justices of the sessions was a judicial act, revisable by *certiorari*. *People* v. *Supervisors of El Dorado County*, 8 Cal. 58, is closely analogous to this in principle. There the board of supervisors allowed the county recorder seventy-five cents each for drawing certain warrants. This court held that *certiorari* was the proper remedy. On looking into the ordinance brought up it will be seen that the board undertook to appropriate in favor of third parties money of the treasury for certain services to be rendered, and that the ordinance directs the issuance of warrants for this purpose. This is equivalent to an auditing and allowing of a claim to this extent on the treasury, and involves the same exercise of judicial power as the case last referred to. In other words the board pass upon and decide upon the right to appropriate and allow this claim, and adjudge it to be disbursed. We do not see that this act does not partake of the nature of a contract with the binding force of an appropriation to meet it. Such a claim is not in principle different from an allowance or settlement of a claim or pretended claim, which is brought, it seems, within the power of the courts to review on *certiorari*, when made without legal authority."

Various Local Boards. — When we come to the decisions respecting the application of *certiorari* to proceedings of other inferior boards exercising an authority which is generally legislative or ministerial, but sometimes judicial, we shall find the same conflict of opinion that has arisen regarding boards of supervisors. Thus, where school boards are authorized to take proceedings for the division or consolidation of school districts, or the adoption of text-books, and the like, there is no doubt that for mere irregularity in the proceedings not affecting the jurisdiction there is no redress by *certiorari*: *Donough* v. *Dewey*, 82 Mich. 309; but where there is no authority to proceed without notice, and it is not given, or no authority to proceed at all in a particular case, *certiorari* will generally be sustained: *Miller* v. *School Trustees*, 88 Ill. 26; *State* v. *Graham*, 60 Wis. 395; *State* v. *Whitford*, 54 Wis. 150. Where a state board of education ordered a change in text-books previously adopted, such order was annulled by *certiorari*, because the statute required such change to be preceded by notice, and such notice had not been given, the court saying: "The authority of the board to effect a change was thereby made dependent upon giving the prescribed notice, and its exercise was forbidden except after such notice was given": *People* v. *Board of Education*, 49 Cal. 684. But where a similar question was subsequently presented to the same court respecting the action of a local board of education, the court, without overruling or otherwise noticing the prior decision, declared the action of such board legislative, and therefore not subject to review. "The board," said the court, "acted upon the proposition before it as one of policy and expediency, aiming to adopt that which, in its judgment, would be best for the constituency which it represented. Its action was, then, political and legislative, and was in no proper sense judicial in its character. It is conceded that the board exercised its judgment in the action which it took, but this it was called to do in the exercise of legislative functions. It is apparent that the exercise of judgment is not

the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated": *People* v. *Oakland Board*, 54 Cal. 375.

Though it was held in *Williams* v. *Supervisors*, 65 Cal. 160, that proceedings to form a reclamation district are legislative and not subject to *certiorari*, we apprehend that this decision is in opposition both to reason and to authority, and that if any tribunal which is authorized to create, enlarge, or change the boundaries of a drainage or reclamation district under certain circumstances only proceeds to act under other circumstances, and this fact appears by the record, *certiorari* will lie, especially if the result of the action is a determination of some question of fact which the parties interested are thereby precluded from controverting in some subsequent proceeding: *Null* v. *Zierle*, 52 Mich. 540. This question was more carefully considered in *Commissioners of Drainage District* v. *Griffin*, 134 Ill. 330, than elsewhere, in which the court said: "The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. But it is not essential that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes termed "*quasi* judicial." The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others they act judicially in making their decision, whatever may be their public character. The proceeding by which the boundaries of the drainage district in question were enlarged by the drain commissioners were, at least in most of their important features, judicial in their character. The commissioners were required to ascertain and determine from evidence whether the requisite number of adult owners of land in the district had signed the petition for the annexation of the adjacent lands, and whether the signers were the owners of the requisite proportion of lands embraced within the district. They were also required to ascertain and determine from evidence whether the lands sought to be annexed to the district were involved in the same system of drainage, and required for outlets the drains of the district. When these facts were determined judicially, and not till then, were the commissioners authorized by statute to enter their order annexing such lands. From their decision no appeal was given, nor were any other means provided by the statute for reviewing their proceedings. In every point of view, then, the act comes within the class of cases where *certiorari* is the prescribed remedy." In a number of cases in Minnesota, however, the courts of that state have determined that proceedings of the county commissioners dividing a town were essentially legislative in character, and therefore not subject to review by *certiorari*: *Moede* v. *Stearns County*, 43 Minn. 312; *Christlieb* v. *Hennepin County*, 41 Minn. 142; *Lemont* v. *Dodge County*, 39 Minn. 385. It may be said of these latter cases, however, that the result of the action taken by the county commissioners could not affect private rights, or constitute a decision respecting issues in which private persons were interested to the same extent as the decision of a board organizing lands into a drainage or reclamation district, because, in the latter case, the terms of the statute do not permit of the inclusion of the lands within the district unless of a class to be benefited by and chargeable for the proposed work of reclamation or of drainage, and in subsequent proceedings to collect assess-

ments the landowner is necessarily precluded from averring that his lands were of such a character that they could not be benefited by the proposed work, and therefore ought not to have been included in the reclamation or drainage district. Perhaps as extreme a case as any which can be cited is *People* v. *Martin*, 142 N. Y. 228; *post*, p. 592. The police commissioners of the city of New York were required to cause to be published certain lists of nominations in "a newspaper which advocates the principles of the political party that at the last preceding election cast the largest number of votes in the state," and to select the paper which according to the best information they can obtain has the largest circulation within such city. The board having selected one newspaper, the managers of another sought to review this action, and thereupon the court of appeals determined that the action of the board was judicial, and therefore reviewable, because they were not authorized to act arbitrarily, nor without making an inquiry in good faith, though they need not resort to "any particular evidence, nor give the various newspaper representatives a formal hearing."

In New York an award by the commissioners of the land-office of a grant of land to a person who was not the owner of the adjacent highland, when, by law, the award is not authorized to be made, except to such adjacent landowner, is reviewable on *certiorari*: *People* v. *Jones*, 112 N. Y. 597.

Assessment and Equalization of Taxes.—*Certiorari* is a proper remedy in a majority of the states to annul the action of assessors (*State* v. *Nunn*, 39 N. J. L. 422; *Milwaukee I. Co.* v. *Schubel*, 29 Wis. 444; 9 Am. Rep. 591; Cooley on Taxation, 753–759); or of boards of equalization (*People* v. *Supervisors*, 59 Cal. 321; *San Francisco etc. Ry.* v. *State Board*, 60 Cal. 12; *Garretson* v. *Santa Barbara*, 61 Cal. 54), when they have acted in excess of their authority. "The following conclusions are deduced by the authorities: That the writ does not lie to a collector of taxes or any other mere ministerial officer to review either his action, or any prior action on which his own was based; that assessments cannot be revised or set aside on this writ on the ground merely that they are excessive or unequal; or that the assessors have erred in any matter of judgment, or have been guilty of any irregularity in the exercise of their authority not being of a nature to deprive them of jurisdiction, or to take from the complaining party any substantial right. The discretionary act of a county board in equalizing the assessments of the county, like the assessments themselves, is not subject to review on this process. In the following cases action may be set aside on *certiorari*: Where the assessment is erroneous in point of law, either because the assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of statutes on which parties assessed have the right to rely for their protection; where errors of like character are committed by any appellate jurisdiction which is empowered by statute to review, revise, or equalize an assessment; and where municipal bodies in levying assessments for local improvements exceed their authority or lay down erroneous principles to guide the assessors or commissioners who are to make them": Cooley on Taxation, 757.

Election Canvassers.—If any tribunal or officer is authorized to canvass the return of elections, and to ascertain and declare the result thereof, and to issue a certificate of such result, this duty is generally regarded as of a *quasi* judicial character, and, therefore, subject to *certiorari* to the same extent as the action of other tribunals of *quasi* judicial character: *Whitney*

v. *Board of Delegates*, 14 Cal. 479; *Cunningham* v. *Squires*, 2 W. Va. 422; 98 Am. Dec. 770; *Alderson* v. *Commissioners*, 32 W. Va. 454.

Removals from Office.—Perhaps the clearest and best established illustration of the fact that an act not essentially judicial may be made so by requiring it to be preceded by an investigation, after due notice to the parties interested, is the class of cases arising under laws authorizing the removal of officers for cause and after the hearing of charges against them. To remove from office is generally an executive function—at all events, it is not essentially judicial, for the executive may be vested with this function to be exercised at his pleasure or caprice, or for such cause as to him may seem proper, and upon such inquiries as he may think best to make, or in the absence of any inquiry whatever. The power may also be vested as to municipalities and counties in their common councils, boards of supervisors, and other local authorities, and even then is not necessarily or ordinarily judicial or *quasi* judicial. If, however, the law vesting the authority either in the governor, or in some local body, or otherwise, indicates that such authority shall be exercised for cause only, and either expressly or by implication that the officer against whom the proceeding is shall have notice thereof, and of the charges against him, and shall be entitled to be heard and produce evidence in his defense, then the proceeding is judicial in character, because the power to hear and determine is to be exercised, as in courts, only after notice and a hearing on the merits, and the officer is recognized as having a right in his office of which he cannot be deprived, except for proper cause ascertained by a proceeding judicial both in its form and in its consequence. While *certiorari* is not a substitute for *quo warranto*, and is not available as a means of trying title to an office, or of removing a *de facto* officer, or otherwise questioning his right to the office (*State* v. *Brown*, 53 N. J. L. 162; *Donough* v. *Dewey*, 82 Mich. 309; *State* v. *City Council of Camden*, 39 N. J. L. 416; *Coyle* v. *Sherwood*, 4 Thomp. & C. 45), yet, if one has held an office, and proceedings have been instituted to remove him therefrom, or if he has been removed, or attempted to be removed, without a hearing, where the law entitles him to such hearing, he may by *certiorari* assail the proceeding. In other words, if he can only be removed for cause and after a hearing, and no remedy is given him by appeal, he is entitled to *certiorari* under the same circumstances and for the same causes as in other judicial or *quasi* judicial proceedings: *Carter* v. *Durango*, 16 Col. 534; 25 Am. St. Rep. 294; *Board of Alderman* v. *Darrow*, 13 Col. 460; 16 Am. St. Rep. 215; *Biggs* v. *McBride*, 17 Or. 646; *People* v. *Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644; *People* v. *Nichols*, 79 N. Y. 582; *Merrick* v. *Arbela Township*, 41 Mich. 631; *Mayor* v. *Shaw*, 16 Ga. 172; *Speed* v. *Common Council*, 98 Mich. 360; 39 Am. St. Rep. 555; *Dullam* v. *Willson*, 53 Mich. 392; 51 Am. Rep. 128. Nor can the removing power capriciously determine that a cause having no connection with the office or its duties, and which if it exists, manifestly will not render the accused officer an unfit or improper person to fill the office, nor prejudice the public in relation thereto, is a sufficient cause of removal, and if such determination should be made, it will be vacated on *certiorari*. In other words while the superior courts, in their supervising and controlling power, will not, in this class of cases, undertake to determine the truth from conflicting testimony, they will not sustain a removal in a case where it was clearly not authorized by law, as where the removing board did not, by proper notice, acquire jurisdiction over the party to be affected by its action, or where, though it acquired such jurisdiction, it directed the removal for some act, omission, or condition which, in con-

templation of law, cannot be regarded as a cause warranting the removal, conceding it to exist as charged against the officer and found by the examining or removing board: *State* v. *Duluth*, 53 Minn. 238; 39 Am. St. Rep. 595; *Speed* v. *Common Council*, 98 Mich. 360; 39 Am. St. Rep. 555.

Ministerial Acts of Judicial Officers.—As legislative and administrative officers and boards are sometimes vested with judicial functions, and treated, while in the discharge of those functions, as judges whose acts are subject to annulment or review by *certiorari*, some judicial officers are sometimes vested with mere ministerial or executive functions, in the discharge of which they are not treated as judges, and their acts cannot be avoided or reviewed by *certiorari*. The most familiar instances of the discharge of ministerial duties by judicial officers occur in the inferior courts when their judges are charged with duties which in the higher courts are committed to clerks and other officers, such as the making up of records, the issuing of executions and other writs, taking and certifying the acknowledgment of conveyances, and the like. All these are duties essentially ministerial, and remain so though the person directed or authorized to perform them is a judge, and his action, though not authorized by law, is not reviewable by *certiorari*: *Re Rourke*, 13 Nev. 253; *Matthews* v. *Houghton*, 11 Me. 377; *Kyle* v. *Evans*, 3 Ala. 482; 37 Am. Dec. 705. So where, by statute, a justice of the peace was required on complaint being made by commissioners of highways of the existence of an encroachment upon a public road, to issue a precept to a constable to summon a jury to inquire whether the encroachment existed, and, when such jury should appear, to administer oaths to the witnesses, it was held that *certiorari* could not issue to review the proceedings of the justice, because he had no authority to render any judgment, or to do any thing except to perform the ministerial duty of summoning the jury and swearing the witnesses: *People* v. *Walter*, 68 N. Y. 403; *Pugsley* v. *Anderson*, 3 Wend. 468; *Pearsall* v. *Commissioners*, 17 Wend. 15. A similar ruling must result when a judge is vested with authority to appoint a person to fill a vacancy in a public office. The duty is not judicial, and cannot be made so by devolving it upon a judge, and therefore his action, even when it takes place in the mistaken belief that a contingency calling for action existed, cannot be annulled by *certiorari*: *People* v. *Bush*, 40 Cal. 344.

WEIR *v.* MEAD.

[101 CALIFORNIA, 125.]

OFFICIAL BOND.—AN ADMINISTRATOR'S BOND purporting to be the joint obligation of the principal and the sureties, and the several obligation of the latter, and which the principal does not sign, though letters of administration are issued to him thereon, under which he receives and misappropriates the estate of the decedent, is absolutely void against the sureties, who, therefore, cannot be held answerable for his default.

Frank R. Wehe, for the appellants.

F. D. Soward, for the respondents.

126 BELCHER, C. Hiram G. Weir was a resident of Sierra county, and died in August, 1883, leaving a last will, by

which he devised all his property to the respondents in this action, and in which he named the defendant Mead as the executor thereof. The will was duly admitted to probate by the superior court of Sierra county in October following, and letters testamentary were ordered to be issued to Mead, "upon giving bond required by law in the sum of six thousand and five hundred dollars." A bond was thereafter approved by the judge and filed by the clerk of the court, which recited: "That I, Michael H. Mead, as principal, am held and firmly bound unto the state of California in the sum of six thousand five hundred dollars, lawful money of the United States of America, in which sum I am also jointly bound with each of my sureties hereinafter named. And we, Robert Forbes (and five others), as sureties, are severally held and firmly bound, and jointly with said [127] Michael H. Mead, are held and firmly bound unto the said state of California, in the following sums respectively for the payment of which, well and truly to be made, we, and each of us, respectively bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally as aforesaid, firmly by these presents."

Then follow the conditions of the bond and the signatures of the six sureties.

Mead, the principal, never signed the bond, but on the day it was filed letters testamentary were issued to him by the clerk, and there was indorsed thereon the usual oath for the faithful performance of his duties. Thereupon he took possession of all the property of the estate of the decedent, and thereafter continued to act as executor of the said will until June 9, 1890, when a decree was duly made and entered in the matter of the said estate, settling his final account and distributing the residue of the estate, consisting of twelve hundred and sixty-two dollars and sixty-nine cents in money, to the legatees named in the will who are the plaintiffs and respondents here.

Mead never paid to the distributees any part of the money so distributed to them, and in November, 1892, they commenced this action on the said bond to recover the same, making Mead and four of the sureties signing it parties defendant.

Mead failed to appear, and his default was duly entered. The other defendants answered, and among other things, denied in effect that the so-called bond ever became a valid

bond, or imposed any obligation upon them, for the reason that it was never signed or executed by Mead, the principal named therein.

The case was tried by the court without a jury, and judgments in proper form were entered in favor of the plaintiffs, from which, and from an order denying their motion for a new trial, the defendants, other than Mead, appeal.

Our code provides that "every person to whom letters [128] testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court or a judge thereof": Code Civ. Proc., sec. 1388.

The plain meaning of this provision is that the principal and sureties must sign the bond before letters can be issued, for obviously there can be no execution without signing.

It will be observed that the bond in suit here is not in form the joint and several obligation of all the parties, as it should be, but is the joint obligation of the principal and sureties, and the several obligation only of the latter.

The question then is, Was the bond, it not having been executed by the principal, valid for any purpose, and can the appellants, who signed it as sureties, be held liable thereunder?

In *City of Sacramento* v. *Dunlap*, 14 Cal. 421, the action was upon a bond which purported to be the joint bond of the principal and sureties, but was signed only by the sureties; and the question for determination was whether the intended principal or the sureties were bound by it. It was held that the plaintiff could not recover upon the bond, and the court, speaking through Field, chief justice, said: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so it was incomplete, and without binding obligation upon either": Citing *Bean* v. *Parker*, 17 Mass. 591; *Wood* v. *Washburn*, 2 Pick. 24; *Sharp* v. *United States*, 4 Watts, 21; 28 Am. Dec. 676; *Fletcher* v.

Austin, 11 Vt. 447; 34 Am. Dec. 698; *Johnson* v. *Erskine*, 9 Tex. 1.

[129] The learned justice then refers to certain decisions in other states which might seem to announce a different doctrine, and says that they were based upon bonds which were both joint and several, and he intimates that the liability might be different on the two kinds of bonds.

In *People* v. *Hartley*, 21 Cal. 585, 82 Am. Dec. 758, the action was upon a bond which was construed to be the joint obligation of the principal and sureties, and the several obligation of the sureties, so far as regards the amount for which each undertook to be liable. The bond was signed by the sureties, but not by the principal. The opinion in this case was also delivered by Field, chief justice, and it was held that the rule declared in *Sacramento* v. *Dunlap*, 14 Cal. 421, was applicable, and that the bond imposed no binding obligation upon the sureties.

In *Kurtz* v. *Forquer*, 94 Cal. 91, the action was upon a bond which was alleged to have been executed by two of the defendants as principals, and by the other defendants as sureties. The bond purported to be the bond of all the defendants, but it was in fact signed only by the sureties. It was held that the plaintiff might recover on the bond, and that the cases of *Sacramento* v. *Dunlap*, 14 Cal. 421, and *People* v. *Hartley*, 21 Cal. 585, 82 Am. Dec. 758, were not in point, "because in those cases the bonds sued on were strictly joint, and not several, while in the case at bar the obligation is expressly joint and several."

In Murfree on Official Bonds the law is thus stated: "A bond purporting to be that of a principal and his sureties joint in form, and only several in recited limitations of the liabilities of the sureties, is absolutely void if it is not executed by the principal. Being a joint bond, his signature was necessary to its validity, for the defects, which can be cured upon their suggestion in the complaint, do not embrace the absence of the signature of the principal obligor. Without his signature the instrument is not his deed. There is no bond of his in which defects can be suggested and cured": Sec. 252.

[130] In other states the decisions are conflicting upon the question whether the sureties can be held liable on a bond which purports to be joint and several, but has not been signed by the principal.

The last case to which our attention is called bearing upon this question, and deciding in effect that sureties may be so held, is *Trustees* v. *Sheik*, 119 Ill. 579; 59 Am. Rep. 830. The opinion in the case is an able one, and it reviews quite fully the decisions on both sides of the question. It is said: "We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts, that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri, and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned."

On the other hand, the last case to which our attention is called, holding the other way, is a decision by the supreme court of South Dakota in *Board of Education* v. *Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767. In this case, too, the opinion is quite able and clear, and, after reviewing at length all the prior decisions on both sides of the question, it reaches a conclusion directly contrary to that reached by the supreme court of Illinois. It is said:

"After a careful review of the authorities and the reasoning upon which they are based we think the better rule is, that an official bond in which the officer is named as principal, but which is not executed by him, is *prima facie* invalid, and not binding upon the sureties."

It is not necessary here to cite or comment upon the numerous cases reviewed in the opinions last referred to, as this case clearly falls within the rule declared in the [181] two California cases first cited. That rule is well supported in other states, and we think it should be followed here.

There is a remark made by the supreme court of Michigan in the case of *Johnston* v. *Kimball*, 39 Mich. 187, 33 Am. Rep. 372, which we think applicable to this case, and we therefore quote and adopt it: "Our statutes plainly contemplate that the treasurer shall himself be a party to his own official bond; and while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent

liability will not bind the obligors, we are of opinion that where he purports to be obligor and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature before they can be held responsible."

Here there was no evidence that the sureties intended to be bound without requiring the principal's signature, but, on the contrary, the evidence introduced as to one of them tended to show that he did not so intend.

It follows that the judgment and order should be reversed and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

SEARLS, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, it is ordered that the judgment and order be reversed and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

HARRISON, J., GAROUTTE, J., PATERSON, J.

BONDS NOT EXECUTED BY SOME OF THE PARTIES.—The principal case presented the question of a bond which, from inspection, appeared to be intended to be executed by a party who in fact never executed it, unless his delivery of the instrument was, in contemplation of law, equivalent to an execution of it upon his part. The person who omitted to execute the bond was the principal therein, and there was no doubt, by his subsequent assumption of the duties of the office and the receipt of the property for the preservation of which the bond was given, he had become personally liable to account for such property, whether the sureties were so liable or not; and it was the opinion of the trial court that, because the principal was liable with and to them to the same extent as if he had actually signed the bond, his omission to do so was not material. In at least four of the states such appears to have been the conclusion reached by their courts: *State* v. *Peck*, 53 Me. 284; *State* v. *Bowman*, 10 Ohio, 445; *Loew* v. *Slotcher*, 68 Pa. St. 226; *Trustees* v. *Sheik*, 119 Ill. 579; 59 Am. Rep. 830.

The very decided weight of authority is in conflict with the view expressed above, and affirms that, when it appears upon the face of the bond that it was intended that all the persons therein named should become parties thereto, whether as principal or as sureties, each surety is presumed to sign upon the implied condition that all the other parties named in the instrument will also become parties thereto, and that the form of the instrument as thus drawn gives notice to the obligee of this implied condition on the part of the sureties, and, therefore, that he cannot hold them where the bond is not executed in the form and by the parties originally intended, unless he can show a waiver upon their part of any defect in its execution in this respect: *People* v. *Hartley*, 21 Cal. 585; 82 Am. Dec. 758; *City of Sacramento* v. *Dunlap*, 14 Cal. 423; *Allen* v. *Marney*, 65 Ind. 398; 32 Am. Rep. 73; *Pepper* v. *State*, 22 Ind. 399; 85 Am. Dec. 430; *Sharp* v. *United*

States, 4 Watts, 21; 28 Am. Dec. 676; *Guild* v. *Thomas*, 54 Ala. 414; 25 Am. Rep. 703, and note; *Johnson* v. *Kimball Tp.*, 39 Mich. 187; 33 Am. Rep. 372; *Hessell* v. *Johnson*, 63 Mich. 623; 6 Am. St. Rep. 334; *Fletcher* v. *Austin*, 11 Vt. 447; 34 Am. Dec. 698.

In some of the cases it appeared that the bond sued upon was joint, and in others the report does not disclose whether it was joint, or joint and several; while in a few instances, where it expressly appeared that the bond was joint and several, the sureties were held not to be found thereby in the absence of its execution by the principal: *Board of Education* v. *Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767; *Bunn* v. *Jetmore*, 70 Mo. 228; 35 Am. Rep. 425; *Russell* v. *Amable*, 109 Mass. 72; 12 Am. Rep. 665. In truth, we do not know of any case which is necessarily inconsistent with this opinion, and which affirms the liability of a surety upon the nonexecution of the bond by his principal, though it is joint and several in form. Perhaps the case of *Kurtz* v. *Forquer*, 94 Cal. 91, may be regarded as sustaining this view, and it was certainly calculated to lead the trial court in the principal case to the decision which the appellate court adjudged to be erroneous. In the case in 94 Cal. Judge McFarland undertook to distinguish it from the earlier California cases by declaring that "they are not in point, because in those cases the bonds sued on were strictly joint, and not several; while in the case at bar the obligation is expressly joint and several." He added: "While several persons are named in the body of the instrument as parties thereto, it is not necessarily invalid, as against those who have signed it, because others named have not signed. Such a result would follow where it appeared on the face of the instrument, or by proof, that the person sought to be charged signed upon the consideration that other persons named would also sign. Nothing of the kind appears, however, in the case at bar. The three sureties, who stood on the same footing, did sign the instrument; and it is evident that the signature of the principals, who were already bound by the contract referred to in the bond, were not necessary as a consideration. Moreover, appellants delivered the bond, without the signatures of the principals, to the plaintiff. We think, therefore, that the sureties are liable, so far as this point is concerned." This case, therefore, is not necessarily inconsistent with the rule maintained by the majority of the cases, for they proceed upon the principle that the surety is not presumed to have intended to have delivered an instrument different in form and substance from that to which he affixed his name, but it appeared in the case in 94 Cal. that this presumption had been rebutted by proof that it was the sureties who had delivered the instrument, and having delivered it in its imperfect condition, they were necessarily estopped from alleging that they did not intend it to be so delivered.

McConoughey *v.* Jackson.

[101 California, 265.]

Municipal Corporations.—The Allowance of a Claim by a Board of Trustees of a Municipality is a Judicial Act involving the determination of the existence of the indebtedness, and such determination is binding upon its clerk, and precludes him from resisting an application for a writ of mandate to compel him to issue a warrant upon such allowance and claim upon the ground that no indebtedness in fact existed.

Pleading—Mandamus.—A Denial in response to an application for a writ of mandate to compel the issuing of a warrant in payment of an allowed claim that any indebtedness existed in favor of the applicant is a denial of a conclusion of law, and, therefore, is insufficient to tender an issue.

Pleading.—A Denial Upon Information and Belief of Facts Peculiarly Within the Knowledge of the defendant is unavailing. Therefore, if it is the duty of the defendant, in his official capacity, to know whether or not an allegation is true, he will not be permitted to put it in issue by a denial under information and belief.

Municipal Corporations—Rescinding Vote of Common Council.—The legislative department of a municipal corporation may, at any time before the rights of third persons have vested, consistent with the law of its creation and its rules of action, rescind previous votes and orders.

Municipal Corporation—Rescinding Allowance of Claim.—If a claim is properly presented to the trustees of a municipal corporation and allowed and approved by them, and their action accepted by the claimant, it becomes a valid and binding contract, and can be avoided only for a cause sufficient to invalidate other contracts.

Pleading.—An Averment on Information and Belief that an applicant for a writ of mandate to compel the issuing to him of a warrant upon a claim allowed him for expenses incurred in procuring legal services to be rendered for the city that he is a city officer and "interested both directly and indirectly in the pretended contract upon which is based the pretended claim referred to in the complaint herein," without a statement of any facts upon which the conclusion is based or the nature of the contract referred to, cannot rise to the dignity of a defense.

J. S. Callen, Gibson and Titus, and Callen and Neals, for the appellant.

A. M. McConoughey, for the respondent.

266 Searls, C. The city of Coronado is a city of the sixth class. M. R. Vanderkloot was president of the board of trustees, and W. H. Jackson was clerk of said city.

In April, 1892, the petitioner filed a claim in writing with the board of trustees for five hundred dollars 267 on account of expenses incurred by him in procuring, at the request of said city, through the board of trustees thereof, counsel and legal services for said city.

The bill was approved by the board of trustees, and ordered paid, and a warrant on the city treasurer, payable to petitioner for the same was ordered. Vanderkloot and Jackson, the clerk, refused to draw, sign, or countersign the warrant.

There was sufficient money in the treasury to pay said warrant. Upon this showing, on petition, the superior court, on the eighth day of February, 1893, issued an alternative writ of mandate to the president and clerk, requiring the president to draw and sign the warrant and the clerk to countersign and deliver said warrant, or to show cause, etc.

The defendants appeared and demurred to the petition, which demurrer was overruled by the court, whereupon M. R. Vanderkloot, the president of the board, drew and signed the warrant and made default herein.

Defendant Jackson filed an answer, and subsequently an amended answer, to which a demurrer was interposed, and sustained by the court.

Defendant thereupon declined to amend, and a peremptory writ of mandate issued from which he appeals.

The amended answer, for cause why the writ should not issue:

1. Denied that the city was indebted to the petitioner.

2. Averred, upon information and belief, that there was not sufficient available money in the treasury that could be legally appropriated to its payment.

3. Set up the fact that on the 2d of May, 1892, the board of trustees repealed and rescinded the allowance of the claim and order to draw the warrant.

4. Alleged that plaintiff was an officer of the city, and interested in the claim.

5. That the matter is still under consideration by the board of trustees, and that since the pendency of this action, and on the 30th of January, 1893, the board of [sic] trustees determined the warrant had been ordered drawn through mistake, inadvertence, and misapprehension, rescinded the former action, and ordered that the warrant drawn and signed by the president be canceled, annulled, etc.

The affidavit, which in proceedings of this character stands as a complaint, is lacking in preciseness of detail and fullness of statement, but was still sufficient as against the general demurrer interposed to its sufficiency. In addition to the merely formal parts of the pleading, it in fact and effect avers an indebtedness of five hundred dollars on the part of the

city to petitioner for expenses by him incurred in procuring counsel and legal services for the former, at its order and request by its board of trustees; and being so indebted, the board ordered his bill and written demand therefor paid, and ordered a warrant drawn in his favor for the amount, etc., which the president and clerk refused to draw and countersign; that there was money in the treasury to pay it, etc.

These are the essential facts giving to petitioner a right to the writ, and the demurrer to the complaint was properly overruled.

The first defense set out by Jackson, the clerk of the board, denies the indebtedness to petitioner. This as a defense is wholly insufficient for two reasons:

1. It is the denial of a conclusion of law and not of the facts, viz: the expenses incurred by petitioner for the city.

2. The law has not constituted the clerk either the guardian of the board of trustees or an appellate court to pass upon the facts once decided by the board.

The claim was one which the board of trustees had jurisdiction to hear and determine; such determination was a judicial act, and involved a determination of the fact of indebtedness; and when so determined, whether right or wrong, its action was binding upon the clerk.

A like question was involved in *McFarland* v. *McCowen*, 98 Cal. 329, and reference is made to that case for a fuller expression on this subject.

The allegation in the second defense of a want of funds in the treasury on the 18th of April, 1892, etc., is upon information and belief, and, being a fact peculiarly within the knowledge of defendant, should have been positive in form. As clerk of a municipal corporation of the sixth class one of the duties of defendant was to keep an exact account of all moneys received and disbursed, and a "treasurer's account," which, if correctly kept, showed to a fraction the moneys in the treasury, the warrants drawn thereon, etc. To this extent he discharged one of the functions of an auditor. The treasurer must give duplicate receipts for all moneys received, one of which must be filed with the clerk, and the treasurer can only pay out money on warrants countersigned by the clerk, etc. In short, he is the financial accountant of the city, and practically the only check upon the treasurer: Municipal Corporation Act, secs. 876, 878.

No doubt the legislative department of a municipal corporation, viz., the board of trustees, may at any time before the rights of third persons have vested, if consistent with the law of its creation and its rules of action, rescind previous votes and orders: Dillon on Municipal Corporations, sec. 290.

Thus, it has been held that a resolution to construct a public sewer may be rescinded at a subsequent meeting: *People* v. *Common Council*, 5 Lans. 11. The right of reconsidering a last measure at the same meeting, or pursuant to its rules at a subsequent one, is a right inherent in all legislative assemblies: *Jersey City* v. *State*, 30 N. J. L. 521. So in *Estey* v. *Starr*, 56 Vt. 690, it was held that a vote of a town meeting rescinding its action at a former meeting in authorizing a subscription in aid of a railroad was lawful, no rights of third parties having vested, and nothing having been done under the authority to subscribe.

270 *Tucker* v. *Justices*, 13 Ired. 434, goes as far as any case we have examined. In that case a public bridge had been constructed, and an order made by the county clerk upon the proper officer to make payment, which was not done, for want of funds. At the next term of court, the bridge having fallen down, the order was annulled, and the action of the court was upheld, and a *mandamus* denied.

A valid claim, however, properly presented to the trustees of a municipal corporation, and allowed and approved by them, and their action accepted by the claimant, becomes a valid and binding contract, and can only be avoided for such cause as invalidates other contracts. Corporations can no more play fast and loose over their contracts than can individuals.

In *Brown* v. *Winterport*, 79 Me. 305, it was held that a vote ratifying a contract made by town officers without due authority could not be rescinded so as to affect the validity of the contract.

In the present case, when the trustees, upon the presentation of petitioner's demand, allowed it, and ordered a warrant drawn on the treasurer for the amount, it established his right to a recovery, and being the amount asked for by him, he will be presumed to have accepted the action of the board, or, at any rate, such presumption will arise from his demand of the warrant, and thereafter the board was not at liberty, without the consent of petitioner, to rescind its action, except for some cause which would defeat the claim, treated as a contract.

Nothing of that kind was shown in the answer. The attempt at a defense by averring upon information and belief that petitioner was a city officer, and "interested both directly and indirectly in the pretended contract, upon which is based the pretended claim referred to in the complaint herein," without the statement of any facts upon which the conclusion is based, or the nature of the contract referred to, cannot be said to rise to the dignity of a defense.

271 There is no contract set out in the petition, except such as is implied from the statement of expenses incurred in procuring counsel and legal services for, etc., at the request of the board of trustees.

There being no showing that the order or warrant was irregular on its face, or one which the board was not authorized to draw, it was the duty of the clerk to countersign it, and the judgment appealed from should be affirmed.

VANCLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

FITZGERALD, J., DE HAVEN, J., McFARLAND, J.

MUNICIPAL CORPORATION.—JUDICIAL ACTS OF COUNCIL: See the extended note to *Flournoy* v. *Jeffersonville*, 79 Am. Dec. 474.

PLEADING.—DENIAL ON INFORMATION AND BELIEF, WHEN NOT SUFFICIENT: See the extended note to *Humphreys* v. *McCall*, 70 Am. Dec. 629, 635, where this question is fully discussed.

HOLLENBACH *v.* SCHNABEL.

[101 CALIFORNIA, 312.]

JUDICIAL NOTICE may be taken by a court of the previous proceedings had in the cause, and therefore where, in an action for the possession of personal property, there is an affidavit and undertaking on behalf of the plaintiff for the return of the property describing it, and the return of the sheriff duly certified showing the taking of such property from the defendant and the delivery of it to the plaintiff, the court may take judicial notice of these papers, though not formally offered in evidence at the trial, and make findings against the plaintiff in accordance with the facts disclosed thereby.

JUDICIAL NOTICE will be taken, when necessary for the administration of justice, of all previous and undisputed proceedings in the case appearing therein of record, certified and authenticated as required by law.

PRACTICE.—A FINDING that plaintiff did not rescind a sale is a finding of fact and not a conclusion of law, and all other findings of fact in the case become unnecessary if the plaintiff's right of recovery is based upon his claim that he had rescinded a sale of the property which he sought to recover in the action.

H. Bleecker, for the appellant.

Graff and Latham, for the respondent.

[314] SEARLS, C. This is an action of claim and delivery, to recover possession of certain liquors sold and delivered by plaintiff to defendant Schnabel, and which, it is claimed, were procured by fraudulent representations of defendant.

The cause was tried by the court, written findings filed, and judgment ordered in favor of defendant:

1. For the return of the property.

2. For the sum of seven hundred and twenty-one dollars and seventy-five cents, the value thereof, in case a return cannot be had.

Plaintiff moved for a new trial, and, his motion being overruled, appeals from the order denying such new trial.

The court found, among other things, that on the twenty-eight day of December, 1889, the sheriff of Los Angeles county, under and by virtue of an affidavit, undertaking, etc., filed by direction of the plaintiff, took possession of the property, and thereafter and on [315] the third day of January, 1890, delivered the same to the plaintiff, and that the value thereof was and is seven hundred and twenty-one dollars and seventy-five cents.

Appellant contends that there was no evidence in support of these findings.

There was on file among the papers in the case the affidavit and undertaking on behalf of plaintiff for a return of the property, describing it as in the complaint; the return of the sheriff duly certified, showing the taking of the property from defendant, and describing it precisely as in the complaint and affidavit, and the statement that he delivered it to the plaintiff as found by the court. These papers were not formally offered in evidence at the trial, but, being on file as papers in the case, were used by the court in making its findings.

Treated as evidence, they showed conclusively the delivery of the property to plaintiff, and the question arises, Should a new trial be granted for this cause?

The Code of Civil Procedure, section 520, requires the sheriff to file the affidavit, notice, and undertaking, with his proceedings thereon, with the clerk of the court in which the action is pending.

The answer demanded a return of the property, or a recovery of its value, and damages.

I am of opinion the court was at liberty to take judicial notice of the previous proceedings had in the cause, the evidence of which, under the official signature of the sheriff, was as provided by the code on file in the case.

Courts will take judicial notice of their records and officers. The case of *Blum* v. *Stein*, 68 Tex. 608, involved a like principle. The plaintiffs had brought an action, and wrongfully sued out a writ of attachment under which property of the defendant had been levied upon, sold, and the proceeds paid into court. Defendant had answered, averring the wrongful issue of the attachment, and asking damages on account thereof, and which he recovered. The court entered judgment without reference to the fund arising from the sale of the attached property. On appeal the supreme court held this to be error, and said:

"The court knew judicially that the money was in court," and, after specifying what should have been done with it, added: "To have authorized the court to do this it was not necessary that the evidence rejected should have been introduced."

In *State* v. *Bowen*, 16 Kan. 475, it was held that the court will take judicial notice of all prior proceedings in a case, and hence that on a plea in bar of "once in jeopardy" it was unnecessary to introduce evidence of a former trial, and the verdict rendered on such trial.

In every case where a demurrer is interposed to a complaint upon the ground that the cause of action is barred by the statute of limitations the court must and does, for the purpose of passing upon the question thus presented, take judicial notice of the date at which the action is commenced.

And we think it may be said generally that, when necessary for the administration of justice in a given case, the court will take such notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause.

The findings of the court show that defendant is the owner of, and entitled to the possession of, the property in dispute. Plaintiff introduced in evidence the proceedings in insolvency of defendant, which showed his claim of right to the property, and that it was taken from him by the sheriff, and was held by the latter for the plaintiff. Its value was averred in the complaint, and not denied by the answer, hence the only question was as to the possession by plaintiff. To prove this the return of the sheriff was proper evidence, and, that return being of record, the court might well avail itself of it in determining the fact; or, if the fact had not been found, in determining the right of defendant, as a [317] question of law, to a judgment for its return: *Waldman* v. *Broder*, 10 Cal. 379.

The findings of fact cover all the material issues made in the case. The finding "that plaintiff did not rescind said sales, or either of them," was one of fact, and not a conclusion of law, as contended by appellant. It was the ultimate fact, of which the other facts mentioned in the complaint were but evidentiary: See *Levins* v. *Rovegno*, 71 Cal. 273, where the distinction between conclusions of law and deductions of fact is discussed at some length.

This fact being found, and manifestly all the others become unimportant, for the reason that if plaintiff failed to rescind the contract he was not in a position to recover the property sold in an action for claim and delivery, even had the court found the defendant guilty of fraud.

The order appealed from should be affirmed.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

MCFARLAND, J., DE HAVEN, J., FITZGERALD, J.

EVIDENCE—JUDICIAL NOTICE OF PREVIOUS PROCEEDINGS IN A CAUSE.—The filing of a subsequent indictment is a continuation of the same proceeding, and the court, on the trial of the latter one, can take judicial notice of the prior one: *State* v. *Daugherty*, 106 Mo. 182. Where two persons are jointly indicted and no severance is ordered, the plea of guilty is part of the record of the trial and the court will take judicial notice of it: *State* v. *Jackson*, 106 Mo. 174. Upon the trial of issues taken on the answer of a garnishee the court will take judicial notice of a judgment against the principal defendant in the case: *Kenosha Stove Co.* v. *Shedd*, 82 Iowa, 540. The subject of judicial notice will be found thoroughly discussed in the extended notes to *Lanfear* v. *Mestier*, 89 Am. Dec. 663–697, and *Temple* v. *State*, 49 Am. Rep. 201–207.

IN RE OGIER.

[101 CALIFORNIA, 381.]

WILLS, APPOINTMENT THEREIN OF ATTORNEYS FOR
is a will selecting an attorney and directing t
employ such attorney on all matters pertai
requirements of the will, is not binding upon
disregarded by him, nor does such provision
the execution of the will to such attorney an
as one of the executors of the decedent, thou
declares that where it appears by the terms
intention of the testator to commit the e
administration of his estate to any person
though not named executor, is entitled to le
manner as if he had been so named.

John W. Mitchell, in pro. per., and Wel the appellants.

Graves, O'Melveny, and Shankland, an drick, for the respondent.

382 BELCHER, C. Anna Ogier died o March, 1893, in the county of Los Ang therein consisting of real and personal of more than sixty thousand dollars, a duly executed last will and testame among others, the following provisions:

"27. I appoint the said Mrs. J. de Ba trix of this my last will, and direct tha from giving bonds as such, but charge that my estate is distributed as here should die or be unable to act then I ap my executor, with the same conditions.

"28. I hereby select as the attorney Mitchell, and direct my executrix to co in all matters pertaining to the distribu the requirements of this my last will.

"29. If my said executrix and my s advantageous to my estate and those legatees and devisees not to sell my real sufficient to pay my just debts, immedia then I desire the sale of my property fo ing legacies delayed to such time, not after my demise, as my executrix and m mutually agree. And my said executr

ized to sell any and all of my said real property at public or private sale, and at such price and upon such terms as she and my said attorney may deem advantageous and to the best interest of my estate. And if my said executrix and my said attorney deem it advisable, my executrix may sell my real property for part cash and part deferred payments, secured by mortgage on the property so sold. And in that event there shall be distributed *pro rata* to the devisees named herein the cash so received, and at the time it be received. Provided, however, that such sales shall be made so that my estate can be finally closed and distributed within three years after my demise, if it be possible to do so without detriment to any interest involved."

On March 24th the said will was filed in the superior court of Los Angeles county, accompanied by a petition of Mrs. Shorb, who was named as executrix, asking that [884] the will be admitted to probate, and that she be appointed executrix thereof. The petition was signed by the petitioner, and by Graves, O'Melveny, and Shankland, as her attorneys.

On April 5th John W. Mitchell filed a petition alleging that he was interested in the said estate, being named in the will as attorney in the administration thereof, and, according to its tenor, coexecutor thereunder, and praying that said will be admitted to probate, and that joint letters testamentary be issued to Mrs. Shorb and himself, and that he, the petitioner, be declared to be, and be entered as, the attorney of record for said estate in the matter of the administration thereof in lieu of, and in place and stead of, said Graves, O'Melveny, and Shankland. To this petition Mrs. Shorb filed an answer, denying that Mitchell was interested in the said estate, or was named in the will, according to its tenor, as coexecutor thereof, admitting that she had employed Messrs. Graves, O'Melveny, and Shankland as her attorneys to present the said will for probate, but denying that this was done in disregard of the terms or directions of the will, or in disregard of the rights of Mitchell, and praying that the petition of Mitchell be denied.

The two petitions were heard together, and on May 12th the court filed its findings of fact and conclusions of law, and entered its order admitting the will to probate, and appointing Mrs. Shorb executrix thereof, and denying the petition of Mitchell. From this order denying his petition Mitchell appeals.

The first question presented is, Was appellant entitled to be entered and recognized as the attorney of record for said estate in the place of the attorneys employed by Mrs. Shorb?

No cases are cited in support of appellant's contention in this regard, and it is admitted that none can be found; but it is said that "since it was the declared will of the testatrix that appellant should act as the attorney of her [sic] estate, it is both reasonable and just that the will should be observed in this as well as in other respects."

There is no such office or position known to the law as "Attorney of an Estate." When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate, and for his services the executor is personally responsible. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession (Code Civ. Proc., sec. 1612), and while in the settlement of his account he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts (Code Civ. Proc., sec. 1616), still such allowance can be made only to him, and not to the attorney: *Henry* v. *Superior Court*, 93 Cal. 569. And if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator. Our conclusion, therefore, is that the language employed by Mrs. Ogier: "I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate and the requirements of this my last will," did not constitute a selection which was binding on the executrix, but was simply an advisory provision which she could disregard if she chose to do so.

In *Young* v. *Alexander*, 16 Lea, 108, the will under review contained the following clause: "I hereby nominate and appoint my nephew, M. B. Young, of Jackson county, Tennessee, as advisory and counsel of my said executors, who will assist them in winding up my unfinished and unsettled busi-

ness." The executor refused [386] to recognize or employ Young as counsel in the administration of the estate, whereupon he instituted the suit to compel such recognition and employment. The supreme court said that "however persuasive such a provision may or might be, it can only be effective as an advisory provision"; and it was held that the provision was not binding upon the executor, and that he might ignore it and appoint other counsel at his discretion.

In *Foster* v. *Elsley*, L. R. 19 Ch. Div. 518, the will under review contained the following clause:

"And I declare that my solicitor, William Edward Foster, shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will."

It was claimed that this clause imposed on the trustees the duty of employing Foster as their solicitor; but it was held that it imposed no such trust or duty.

The second and only other question presented is: Did the court err in refusing to direct letters testamentary to be issued to appellant as coexecutor with Mrs. Shorb?

The contention that appellant was entitled to have letters so issued is based upon section 1371 of the Civil Code, which provides:

"Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor."

Does the will show that it was the intention of Mrs. Ogier to commit to appellant the execution of her will and the administration of her estate? To this question there can be in our opinion, but one answer, and that must be in the negative. The only paragraphs of the will relating to the matter are those above quoted. The twenty-seventh paragraph appoints Mrs. Shorb executrix, and charges her "faithfully to see that my estate is distributed as herein directed." The twenty-eighth paragraph selects appellant as the attorney for the estate and [387] directs the executrix to consult and employ him in all matters pertaining thereto. And the twenty-ninth paragraph speaks of "my said executrix" and "my said attorney" and directs what "my said executrix" may do, if she and "my said attorney" deem it advantageous and advis-

able. By these paragraphs no power to act as executor is given to appellant, and it seems evident that the intention of the testatrix was simply to make him the attorney and counselor of the executrix, and not to commit to him the administration of the estate.

The order appealed from should be affirmed.

SEARLS, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.

MCFARLAND, J., DE HAVEN, J., FITZGERALD, J.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT.—One who is named in the will as though an assistant in the trust is, by American practice, usually qualified like any coexecutor. But a testator will sometimes name another person besides his actual executor to advise, or assist the latter, and such person has, if so the testator obviously intended, none of the rights or responsibilities of an executor, nor any right to intermeddle, but may advise: See Schouler's Executors and Administrators, sec. 89, citing Williams on Executors and Administrators, 7th ed., 244, and 3 Redfield on Wills, 2d ed., 62.

BLAISDELL *v.* LEACH.

[101 CALIFORNIA, 405.]

A CONVEYANCE TO WHICH THE SIGNATURE OF THE GRANTOR IS AFFIXED BY ANOTHER at the grantor's direction, in his presence, or which, though not so affixed, is subsequently adopted and ratified by the grantor, is valid.

CONVEYANCE—ESTOPPEL FROM ACKNOWLEDGMENT OF.—If one named as a grantor in a deed acknowledges that the signature thereto is his before a notary public, who thereupon affixes his certificate of such acknowledgment, this is a public declaration of such grantor which he is estopped from controverting as against one who, in reliance thereon and without notice, has parted with property.

ESTOPPEL TO DENY THE EXECUTION OF A CONVEYANCE ON THE GROUND THAT IT WAS FORGED arises when being produced to the grantor by a notary public, such grantor acknowledges the execution thereof and attaches his certificate of such acknowledgment in due form, though the grantor made such acknowledgment in the mistaken belief that the conveyance was an entirely different instrument which he had executed on the same day, if such belief would not have existed had he examined the instrument at the time the acknowledgment was made before the notary public, and the property has been subsequently sold to a purchaser in good faith in reliance upon the record title including such deed and certificate of acknowledgment.

J. B. Campbell and C. C. Merriam, for the appellant.

J. P. Strother, for the respondent.

HARRISON, J. The defendant, Bailey K. Leach, borrowed one thousand dollars from the plaintiff July 18, 1891, and, to secure the payment thereof, executed to him a mortgage upon certain lands which appeared by the record to have been conveyed to him by his wife, Mattie A. Leach. This action was brought to foreclose the mortgage against husband and wife, the plaintiff alleging in his complaint that the wife claims some interest in the mortgaged lands, but that her claim was subject to the lien of his mortgage. Mattie A. Leach filed a separate answer, alleging that she was the sole owner of the lands, and that her husband had never had any interest therein. Upon the trial of these issues the court found that the wife's signature to the deed under which the husband claimed title was a forgery, but that she had acknowledged its execution to the notary public, and that the conveyance had been placed on record with the notary's certificate of her acknowledgment indorsed thereon. No question was made of the good faith of the plaintiff in loaning the money, and the court held that he was entitled to rely upon the record evidence of title, and rendered judgment for the foreclosure of the mortgage. From this judgment the defendant, Mattie A. Leach, has appealed.

The record discloses the following facts connected with the appellant's acknowledgment of the conveyance: It appears that on the morning of the 16th of July the appellant had signed a lease of certain property and given it to her husband, and that in the afternoon of that day her husband handed the deed in question to the notary, with his wife's name already signed thereto, and requested him to go with him to his house and take her acknowledgment. The notary testified that when he and the husband reached the house he explained to Mrs. Leach the object of his visit, and "got up from my chair and walked over to her with the deed in my hand, passed it to her and took my seat again, and, as I suppose, she read it. I don't know. She peered over it. I don't know whether she read it or not. I got up then and asked her if it was her signature, and she acknowledged the execution of that instrument. She said she did, and I placed my seal to it and handed it to Mr. Leach." Mrs. Leach contradicts the notary in some details, but the findings of the court

must be accepted as determinative of the facts that her signature had been placed to the instrument without her knowledge or consent, and that the facts stated in the notary's certificate are correct. Mrs. Leach does not, in her testimony, say that she then questioned the genuineness of her signature, but that the instrument did not appear to her to be the same one as that upon which she had placed it. Taking the most favorable view for the appellant, it would appear that after she had signed the lease and given it to her husband, he substituted for it the deed to himself with her name affixed thereto, and that she paid but slight attention to the instrument when it was presented to her for her acknowledgment, and admitted to the notary that it was her signature.

The Civil Code, section 1091, requires that a grant of real property shall be subscribed by the grantor in order that the title may be transferred thereby, but it is not necessary that the signature of the grantor be affixed by ~~see~~ himself. It may be so affixed by another, if done in his presence, and by his own direction (*Gardner* v. *Gardner*, 5 Cush. 483; 52 Am. Dec. 740), and he may also adopt and ratify a signature made by another without any previous authority (*Bartlett* v. *Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101); and the adoption of a forgery has been held to be binding upon the maker of a promissory note: *Forsyth* v. *Day*, 46 Me. 176; *Greenfield Bank* v. *Crafts*, 4 Allen, 447. The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery such estoppel may not arise, but if, with knowledge of the forgery, he should declare to an innocent person that the signature was his own, and that he had executed the instrument, and thereby induced him to purchase the property, he could not afterwards claim the property upon the ground that the instrument was a forgery.

When the instrument in question was presented to Mrs. Leach for her acknowledgment, it was competent for her to adopt the signature of her name that had been placed there without her knowledge or authority, and by such adoption give it the same validity as if placed there by herself. She must be presumed to know her own handwriting, and her statement to the notary that she had executed the instrument to which it was affixed prevents her from questioning the correctness of that statement as against one who, in reliance

thereon, has parted with his property. The statute has designated a notary public as one of the officers to whom a grantor may make a formal acknowledgment of his execution of an instrument for the purpose of establishing the fact of such execution and having a public record made thereof; and when such acknowledgment is made by the grantor and certified by the notary, it is a public declaration of that fact to all persons who may in good faith act thereon, which the grantor is estopped from denying. If the notary is himself deceived, as, for instance, [410] if another person should personate the grantor and acknowledge the signature, the title of the true owner would not be affected, but when the person named in the instrument appears in person before the officer and makes such acknowledgment, he is estopped from afterwards denying his declaration, as well as the fact of his signature, against any one who, without any other notice or knowledge than is conveyed by the instrument, parts with his property upon the strength thereof.

Although the court does not find that Mrs. Leach in terms adopted the signature to the deed, yet its finding that she was so negligent in acknowledging its execution as to estop her from disputing the plaintiff's claim is fully sustained by the evidence. By her own testimony she did not at the time of her acknowledgment deny the genuineness of her signature, and although she says that she then thought the instrument was not the one she had signed in the morning, she failed to give it such an examination as to convince her of that fact, and the testimony of the notary that he handed the instrument to her for her examination, and that she appeared to examine it, shows that she had every opportunity for determining whether or not it was her deed. Having this opportunity for repudiating or adopting the signature, her acknowledgment of its validity estops her from questioning that fact as against the plaintiff, who in good faith has parted with his money to the one in whose favor she made the acknowledgment. If afterwards she ascertained that she had been deceived, and had acknowledged the validity of a deed which was in fact a forgery, the loss would be her own, as against an innocent party who had relied upon such acknowledgment. If she neglected to give the instrument such an examination as would inform her either that another instrument had been substituted for the one which she had signed, or that the signature thereto was not her own, the consequences

of such neglect should fall upon herself rather than upon one who, by [411] her own positive declaration of its genuineness, had been induced to part with his property. "When a man knows that he is conveying or doing some thing with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, the deed so executed, although it may be voidable on the ground of fraud, is not a void deed": *Hunter* v. *Walters*, L. R. 7 Ch. App. 88; see, also, *Goodell* v. *Bates*, 14 R. I. 65; *State* v. *Matthews*, 44 Kan. 596; *Tunison* v. *Chamblin*, 88 Ill. 378; *Shirts* v. *Overjohn*, 60 Mo. 305; *Chapman* v. *Rose*, 56 N. Y. 137; 15 Am. Rep. 401. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer": Civ. Code, sec. 3543.

The judgment and order are affirmed.

GAROUTTE, J., and PATERSON, J., concurred.

DEEDS—EXECUTION BY ONE OTHER THAN GRANTOR.—If the name of the grantor is signed to a deed by another in his presence, at his request, and as and for his act, the deed is as effective as if signed by himself; and the acknowledgment of a deed by a grantor who did not himself sign it, is a sufficient recognition and adoption of the signature: *Lewis* v. *Watson*, 98 Ala. 479; 39 Am. St. Rep. 82, and note where the cases discussing these propositions are collected.

KENNEDY *v.* CALIFORNIA SAVINGS BANK.

[101 CALIFORNIA, 495.]

CORPORATIONS.—THE DEFENSE OF ULTRA VIRES is looked upon by the courts with disfavor whenever it is presented for the purpose of avoiding an obligation which the corporation has assumed merely in excess of powers conferred upon it, and not in violation of some express provision of the statute.

A CORPORATION HAVING STOCK IN ANOTHER CORPORATION standing in its own name on the books of the latter is liable in an action for its proportion of a debt due from such corporation, where it is not absolutely prohibited from acquiring title to such stock, and cannot avoid such liability by alleging that its acquisition of such title was *ultra vires*, especially when it has received dividends on the stock, and to that extent diminished the corporate property which might otherwise have been applied to the satisfaction of the plaintiff's debt.

James E. Wadham, for the appellant.

William H. Fuller, and Works and Works, for the respondent.

[496] HARRISON, J. During the year 1891 the plaintiff deposited with the California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of [497] deposit, amounting in the aggregate to forty-five thousand dollars. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and, upon its refusal, brought this action, making the other defendants parties to the action, for the purpose of recovering from them their proportion of said indebtedness as stockholders in the California Savings Bank. Judgment was recovered against the savings bank for the full amount of the claim, and against the other defendants for their respective proportions thereof as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that by virtue of the statutes under which it is organized it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation. The California Savings Bank was organized January 13, 1890. September 10, 1890, nine hundred and ninety shares of its capital stock was issued to J. W. Collins, cashier of the California National Bank, and on January 2, 1891, the certificates representing these shares were canceled, and one certificate therefor was issued to the California National Bank, and was thereafter held by it until after the commencement of this action. During this period two dividends upon the stock were paid by the savings bank to the appellant.

The defense of *ultra vires* is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation.

In *Evans* v. *Bailey*, 66 Cal. 112, an action was brought [498] against the stockholders of the California Fruit and Meat Shipping Company to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice

Company, another corporation which held a thousand shares of the capital stock of the corporation debtor, and to its objection that it was *ultra vires* for it to hold stock in another corporation, it was held that as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances, or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defense could not be maintained.

There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corporation, and while it may be conceded that its subscription to the shares of another corporation would be so far in excess of the powers conferred by the statute under which it is organized that the executory contract therefor would not be enforced, it by no means follows that, if such contract is executed, and it has been registered as such stockholder, it is not entitled to a voice in its corporate management, or to its share of the corporate earnings while the corporation is in existence, or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and if the loan is not paid it may become the owner of those shares and have them registered in its name upon the books of that corporation; and in such a case it is subject to the same liabilities as any other stockholder. In *National Bank* v. *Case*, 99 U. S. 628, the bank had become a stockholder in another corporation under such circumstances, and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability.

[489] As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation

of law. "Strangers are presumed to know the law of the land, and they are bound when dealing with corporations to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose, but they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duties, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law, and upon this presumption strangers, having no notice in fact of the unlawful purpose, are entitled to rely": *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 587; 99 Am. Dec. 300.

The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be the owner of it, and to share in all the earnings and assets of the corporation. During the period that it has claimed to [500] be such owner it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate property which otherwise might have been appropriated in satisfaction of the plaintiff's claim: See *Mitchell* v. *Beckman*, 64 Cal. 117. Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability which is correlative to such benefits and fruits, and dependent thereon: See Morse on Banking, sec. 735.

The judgment and order are affirmed.

GAROUTTE, J., and PATERSON, J., concurred.

Hearing in Bank denied.

CORPORATIONS—ACQUIRING STOCK IN ANOTHER CORPORATION.—This question is the subject of a monographic note to *Denny Hotel Co.* v. *Schram*, 36 Am. St. Rep. 134.

CORPORATIONS—PLEA OF ULTRA VIRES—WHEN NOT AVAILABLE.—Where a corporation enters into a contract *ultra vires*, and the other party in reliance thereon expends money, the corporation is liable on the contract, provided it be not in violation of its charter nor prohibited by law: *State Board* v. *Citizens' etc. Ry. Co.*, 47 Ind. 407; 17 Am. Rep. 702. See the notes to *Linkauf* v. *Lombard*, 33 Am. St. Rep. 750, and *New York etc. Ins. Co.* v.

Ky, 13 Am. Dec. 108, where the cases discussing this subject are collected. Conceding the unlawfulness of the sale by a corporation of all of its property to another corporation, and receiving in payment therefor the stock of the grantee, to be distributed among its stockholders, yet if such contract has been fully completed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300. See, also, *Alexander v. Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337, in this connection.

GORDON *v.* CITY OF SAN DIEGO.

[101 CALIFORNIA, 522.]

MUNICIPAL CORPORATIONS—DEED OF, IS EVIDENCE OF THE TRUTH OF THE RECITALS THEREIN.—If a conveyance executed by the authorities of a municipal corporation recites the existence of facts without which its execution would be unauthorized and void, such recitals are evidence of the facts recited, and no other or further evidence is required in support of such deed.

CONSTITUTIONAL LAW—CURATIVE STATUTES.—If the thing wanted or failed to be done, and which constitutes the defect in the proceeding, is some thing, the necessity for which the legislature might have dispensed with by prior statutes, then it is not beyond the power of the legislature to dispense with it by a subsequent statute; and if the irregularity consists of not doing some act or in the manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.

CONSTITUTIONAL LAW.—A DEED DEFECTIVE because not executed under the corporate seal of a municipality may, by subsequent legislation, be given the same effect as if such seal had been regularly affixed thereto.

COTENANCY.—A CONVEYANCE BY A COTENANT, PURPORTING TO GRANT THE WEST HALF OF A LOT of which he owns but the undivided one-half, does not divest his interest in the whole lot, nor does such conveyance operate as a partition, in the absence of the ratification thereof by the other cotenants.

COTENANCY.—A CONVEYANCE OF A SPECIFIC PART of the common property by one of several cotenants may be ratified by the other cotenants, and thus made to operate as a partition or conveyance in severalty, but such ratification must be proved, and will not be presumed.

William H. Fuller, for the appellant.

Cassius Carter, for the respondent.

[522] THE COURT. In this case Department One rendered the following opinion, which was prepared by Mr. Commissioner Searls. We still adhere to the views therein expressed:

"This is an action to quiet title to the east half of pueblo lot 1215, containing about forty-five acres of land, [524] situated in the city of San Diego. The appeal is taken by defend-

ant from a judgment in favor of plaintiff adjudging him to be entitled to said east half of pueblo lot 1215, according to the Poole map of the pueblo lands of the city of San Diego, made in 1856, and adjudging that defendant has no title thereto, etc.; also from an order denying a motion for a new trial. The city of San Diego was a municipal corporation, organized under two acts of the legislature, approved January 30, 1852, and April 28, 1852, respectively. The title of respondent is derived from the appellant, the city of San Diego, through a conveyance executed by the trustees of said city on the twenty-seventh day of February, 1869, to one Thomas Whaley, and which conveys the undivided half of lot twelve hundred and fifteen (1215), according to the official map of said city made by Charles F. Poole, A. D. 1856, and on file, etc. The deed is executed by the president and trustees of the city, who attach their private seals, it being recited that no corporation seal has been 'as yet provided.' Among the recitals of the deed are the following: 'WHEREAS, the president and trustees aforesaid, by the vote of the duly qualified electors of the said city of San Diego, at an election for the special purpose, held in said city on the twenty-fifth day of May, A. D. 1868, in pursuance of an act of the legislature of the state of California entitled, "An act to repeal the charter of the city of San Diego, and to create a board of trustees," approved January 30, 1852, were directed, authorized, and empowered to sell pueblo or city lands, the property of said city; and whereas, on the twenty-seventh day of February, A. D. 1869, the said president and trustees, in compliance with said vote and said act of the legislature, sold to said party of the second part the land and premises, hereinafter described, for the sum of twenty dollars in gold coin of the United States of America, being at the price of twenty-five cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the eighth day of June, A. D. 1868, [535] and said party of the second part has made and completed all the improvements upon said lands by said resolutions or order required to be made, and has fully paid said sum of twenty dollars into the treasury of said city.' The conveyance was duly acknowledged, and was recorded in the office of the county recorder of the county of San Diego, August 21, 1869. On the twenty-eighth day of February, 1869, the same trustees, by a like deed containing like recitals, conveyed the west half

of the same lot (No. 1215) to one J. C. Babcock, which deed was acknowledged and duly recorded March 1, 1869, viz., prior to the acknowledgment and recordation of Whaley's deed. At a special meeting of the board of trustees held June 8, 1868, it was resolved 'that the only way pueblo lands will be granted is as follows': Then follow the conditions, which are, in substance, that one-half of the purchase price is to be paid on securing certificates; the land to be occupied and improved within six months after certificate is taken, and it must be taken out within one month after approval of the petition; two hundred and fifty dollars' worth of improvements to be placed upon tracts of forty acres or less, and four hundred dollars upon tracts of eighty acres, within one year, and if not made, previous payment to be forfeited, and land to revert to the city. When the improvements were made the petitioner became entitled, upon payment of the residue of the purchase price, to a deed, surveys to be made at expense of purchaser.

"It was conceded at the trial that title to the pueblo lands, of which lot 1215 was a part, was, at the date of the execution of the Whaley deed, in the city of San Diego, and that whatever title passed by that conveyance was vested in H. C. Gordon, the respondent. Appellant objected at the trial to the introduction of the Whaley deed, upon several grounds, the most important of which was that said deed was not executed on the part of the city as required by law. The specification of the reasons why not executed as required by law shows that there was no showing that the city ever [526] passed a resolution authorizing the sale or transfer of the property described in the deed; that the property was not sold or conveyed in accordance with the charter of the city of San Diego. The Whaley deed recites the particular facts upon which the authority of the city trustees to convey is supposed to be founded.

"That particular recitals in a deed are binding upon parties and privies, and that this doctrine applies to the authorized acts of a corporation, does not seem to be disputed by appellant. It is essential to an estoppel by deed that the deed itself should be a valid instrument; and, if void, though under seal, it does not work an estoppel at law or in equity: *Caffrey* v. *Dudgeon*, 38 Ind. 512; 10 Am. Rep. 126; *Merriam* v. *Boston etc. R. R. Co.*, 117 Mass. 241. The contention of counsel for appellant is that the deed to Whaley not being executed

under the corporate seal of the city of San Diego before it was admissible in evidence, respondent should have been required to show that the corporate authorities possessed the power to sell the property, that it was sold under such power, and that the board of trustees, when assembled and acting as such, sold the property, and directed the execution of the deed to Whaley. The city of San Diego, as it existed at the date of the execution of the Whaley deed, as before stated, was organized under an act of the legislature of the state of California, approved January 30, 1852, and by an act approved April 28, 1852. The first-named act provided for the election of three trustees, one of whom should be president, etc. The seventh section of the act authorized the board of trustees to sell as much of the property of the city as was necessary to pay its debts, 'giving at least ten days' notice of any property to be sold, and to continue the sale from time to time until said debt is paid.' Section 11 of the act provides that 'when the debts of said city are paid no more of the city property shall be sold except by a vote of the inhabitants of said city they shall be authorized to do so,' etc. It appears from the act that there had been a previous corporation of the same
527 city, the charter of which was repealed by the act first above cited, and the provisions of section 7 were intended to apply to the payment of the debts thereof. The language of section 11, that after the debts were paid 'no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so,' must be construed to empower the trustees to sell upon a vote in favor thereof. When the debts were paid the power of the trustees under section 7 ceased, and thereafter their power of alienation came, if at all, from section 11 and the vote of the inhabitants. According to the recitals of the Whaley deed, the qualified electors, at an election for that purpose held, directed, authorized, and empowered the trustees to sell the land in question, and the board of trustees duly assembled, and acting as such by resolution, prescribed the terms and conditions upon which sales would be made. The recitals in the deed, coupled with the law, are sufficient evidence to bind the parties and show that title passed by the deed, provided it was properly executed. We have seen before that it was executed by the trustees, who purported to act for and in the name of the city, except that they signed their names as trustees, and affixed their private seals, etc. On the seventh day of February

1874, an act of the legislature was approved in the following language: 'SECTION 1. No deed, conveyance, or grant of land in fee, made prior to the twenty-fourth day of November, A. D. 1871, for and on behalf of the city of San Diego and the inhabitants thereof, for a valuable consideration, by the corporate authorities of said city, shall be invalid by reason of the want of a corporate seal, but all of said deeds, conveyances, and grants shall have the same force, effect, and validity as if a corporate seal of said city had been regularly provided and properly affixed thereto by the proper corporate authorities of said city.'

"It is not deemed necessary to go to any great length in discussing the question of the power of the legislature to enact valid curative laws. The field is a broad [528] one, often involving questions of constitutional law, vested rights, retroactive laws, etc., and giving rise to distinctions sometimes too subtle to be readily grasped by the ordinary mind. Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is some thing the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' Tested by this rule, all doubt must vanish as to the power of the legislature to enact the curative law above quoted. No question has ever been suggested, so far as known, of the power of the legislative branch of government to abolish the distinction between sealed and unsealed instruments, as was done by section 1223 of the Civil Code. That a like provision might be enacted in reference to corporate and official documents can scarcely admit of doubt. It is therefore held that the deed of conveyance to Whaley is to be taken, received, and interpreted between the parties to this action precisely as though sealed with a corporate seal of the city of San Diego at the date of its execution. Had vested rights in third parties accrued between the execution of the instrument and the passage of the curative act, a different question would have been presented. That question need not concern us in the present

case. Treating the deed as duly executed in point of form, under a statute conferring power upon the officers to sell and convey the lands of the city upon a majority vote of the inhabitants, the recitals in the deed that an election had been held pursuant to the provisions of the statute, at which the trustees 'were directed, authorized, and empowered to sell pueblo or [529] city lands, the property of said city,' etc., is *prima facie* evidence that an election had been held. It is not here a question of power, but of proof. Many of the authorities go much further in holding to the binding force of recitals in deeds executed by municipal corporations than is necessary to uphold the conveyance in this case: *Jamison* v. *Fopiana*, 43 Mo. 565; 97 Am. Dec. 414; Devlin on Deeds, sec. 848, and cases cited. I am certain the court did not err in the admission of the Whaley deed. Like considerations apply to the admission of the conveyance from the city to Babcock, provided always, that it was material testimony in the case, relevant to the issues joined therein, all of which may properly be considered in connection with the findings.

"The point is made that the judgment is contrary to the findings, and not warranted by the facts as found in the case. The facts as found by the court may be epitomized as follows: 1. The city of San Diego, being the owner of pueblo lot 1215, on the seventh day of February, 1869, conveyed in due form and by valid deed an undivided one-half thereof to one Thomas Whaley; that the plaintiff herein, H. C. Gordon, is the successor in interest, by proper mesne conveyance of the land and interest conveyed to Whaley; 2. That on the twenty-eighth day of February, 1869, one day after the conveyance to Whaley, the city of San Diego executed to one J. C. Babcock a proper deed of conveyance of the entire west half of the same lot, viz., lot 1215; 3. The deed to Babcock was first acknowledged and recorded. Upon this state of facts the court entered judgment quieting and confirming plaintiff's title to the entire east half of lot 1215, and perpetually restraining defendant, the city of San Diego, from asserting title thereto, and that it be declared to have no title thereto. The position of respondent is: 1. That by the conveyance to Whaley of the undivided one-half of lot 1215 he became tenant in common with the city therein; 2. That when, on the next day, the city conveyed the entire west half of the same lot to Babcock, it had conveyed [530] the whole thereof, and, as a consequence, ceased to have any interest

in any part of the lot. This second position is not readily apparent. No doubt two halves of a thing are equal to the whole of it; but the undivided one-half and the whole of one-half of a thing are not equal to the whole of it. When Whaley received a deed of an undivided one-half of lot 1215 he was a tenant in common with the city; and when, on the next day, the city sold the whole of the west half of the same lot, it simply attempted to convey the whole of a parcel of the lot in which it owned an undivided half. If a grantor conveys lot A, which he does not own, I am at a loss to see how, in the absence of mistake or fraud, he can be deemed to have conveyed lot B, which he does own. If the title of Whaley failed to the west half of the lot, it was by a failure to have his deed acknowledged and recorded prior to the recordation of the Babcock conveyance.

"There is, however, another and distinct theory upon which respondent contends the judgment of the court below can be upheld. Section 764 of the Code of Civil Procedure, so far as material, is as follows: 'Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being an owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs, or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be allotted or set apart without material injury to the rights and interests to the other cotenants who may not have joined in such conveyance.' Under this section, or rather by analogy to it, respondent claims that where there are two tenants
[321] in common, each owning an undivided half of land, while neither can make a partition binding upon the other by assuming to convey either half specifically, yet if one does so convey, the other would be at liberty to acquiesce, and to accept the remaining half; and that where he has, as in the present case, done so by conveying such remaining half specifically, the two conveyances operate as a complete and binding partition. In support of this proposition we are

referred to Freeman on Cotenancy, sections 188, 535, and to the cases of *Dall* v. *Brown*, 5 Cush. 289, and *Eaton* v. *Talmadge*, 24 Wis. 217. At section 188 of Freeman on Cotenancy it is said: 'A deed of a specific parcel of land made by one cotenant is not binding on the others, nor can their rights be, to any extent, prejudiced by it. Such a conveyance is not void, but only voidable. It may, therefore, be approved and ratified by the cotenants, and thereby be made to operate as a conveyance in severalty.' *Eaton* v. *Talmadge*, 24 Wis. 217, is substantially to the same effect as the above quotation. The same may be said of many decisions upon the same question. A partial agreement for the partition of land is void under the statute of frauds, and cannot be enforced; but where consummated and ratified by the parties it will be upheld. In *Borel* v. *Rollins*, 30 Cal. 409, it was held that, where an attorney in fact exceeded his authority in executing a deed of partition, his principal, who had ratified the act of partition by his own acts and conduct of solemn significance, such as the execution of deeds of conveyance, which necessarily recognized the partition as of legal validity, was estopped from saying there had been no partition. If the city of San Diego is bound by its acts in the premises it must be upon the ground of estoppel. But estoppels must be mutual. All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land in common is not binding upon his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley, or those holding under him. It is true it appears [523] that the deed to Babcock was first acknowledged and first recorded; but Babcock, for all that appears, may have taken with actual notice of the prior deed of Whaley. Had Whaley conveyed the whole of the east half of lot 1215 an inference might be predicated, perhaps, on that act, as tending to show his acquiescence in a partition; but, so far as appears, he did not do so. It was stipulated at the trial 'that the plaintiff in this action succeeds by proper mesne conveyances to any title or interest in and to said pueblo lot No. 1215, which was conveyed to Thomas Whaley by the deed dated February 27, 1869.' The finding of the court is in harmony with the stipulation. I fail to find in these points any basis for an estoppel *in pais*. *Non constat* but that Whaley or his grantees may still hold an undivided interest in the west half of lot 1215."

It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

Evidence—Recitals in Deeds.—Deeds are admissible as evidence of reputation of the matters recited in them: *Bow* v. *Allenstown*, 34 N. H. 351; 69 Am. Dec. 489, and note. Recitals in a deed to which defendant is a party and plaintiff a stranger are admissible in evidence as simple admissions only, made by the party by whom the deed was executed: *Franklin* v. *Dorland*, 28 Cal. 175; 87 Am. Dec. 111. Recital of one deed in another is evidence of the fact therein recited: *Williams* v. *Keyser*, 11 Fla. 234; 89 Am. Dec. 243, and note. A recital in a deed is evidence only against the party executing the deed: *Mores* v. *Bellows*, 7 N. H. 549; 28 Am. Dec. 372. The recital of a decree of foreclosure contained in a duly acknowledged master's deed is *prima facie* evidence of the existence of the decree: *New York etc. R. R. Co.* v. *State*, 50 N. J. L. 303; see *Pugh* v. *McCue*, 86 Va. 475.

Statutes Curing Defective Acknowledgment of Deeds: See the extended note to *Jordan* v. *Corey*, 52 Am. Dec. 523; and especially the note to *Summer* v. *Mitchell*, 30 Am. St. Rep. 125, where the cases are collected.

Cotenancy—Conveyance of Specific Part of Undivided Property by One Cotenant.—A conveyance made by one of several cotenants, purporting to convey a specific part of the common property, is not void: *Young* v. *Edwards*, 33 S. C. 404; 26 Am. St. Rep. 689, and note; but it cannot be made to the prejudice of the cotenants not uniting in the conveyance: *Gates* v. *Salmon*, 35 Cal. 576; 95 Am. Dec. 139, and note. A conveyance by metes and bounds of a portion of the common estate is void: *Duncan* v. *Sylvester*, 24 Me. 482; 41 Am. Dec. 400, and notes; *Barnes* v. *Lynch*, 151 Mass. 510; 21 Am. St. Rep. 470, and note, with the cases collected.

Le Mesnager *v.* Hamilton.

[101 California, 562.]

A Certificate of the Acknowledgment of a Deed is not Conclusive evidence of the fact of such acknowledgment, but may be impeached by parol evidence that the person therein named never appeared before the officer certifying the acknowledgment.

A Married Woman may Impeach a Certificate that She Acknowledged a Deed, by proving that she did not in fact appear before the officer certifying such acknowledgment nor otherwise acknowledge such deed, and that it was never delivered by her or with her consent.

Acknowledgment of Deed, Impeaching.—Fraud or bad faith on the part of a person named as a grantee in a deed need not be established before its effect may be destroyed by proof that it was never in fact acknowledged by a married woman named as a grantor therein. Without such acknowledgment it has no greater effect than if it had been forged, and it was the duty of the person claiming an interest thereunder to ascertain whether or not it had been executed as required by law.

Pleading.—A Denial of the execution of a deed puts in issue the delivery thereof, though the allegation to which such denial was addressed was

that the defendants did "execute under their hands and seals and deliver" such deed.

APPELLATE PROCEDURE.—If an objection to evidence is made in the trial court on a designated ground and there sustained, the action of the court can be supported on appeal by showing that the evidence was inadmissible on another ground and might have been excluded because of a defect in the defendants' answer, when the trial apparently proceeded on the assumption that such answer was sufficient.

E. H. Bentley, J. R. Du Puy, and R. Dunnigan, for the appellant.

Stephen M. White, Brousseau and Thomas, and R. B. Carpenter, for the respondents.

Graves, O'Melveny, and Shankland, for the intervenor.

[533] DE HAVEN, J. The defendants, Samuel Hamilton and Adelaide E. Hamilton, were and are husband and wife, and this is an action to foreclose a mortgage alleged to have been executed by them on January 2, [534] 1889, to secure a promissory note, also executed by them on the same day, for the sum of seven thousand dollars. The complaint contains a copy of the mortgage, and of the certificate of acknowledgment attached thereto. The certificate is that of a notary public, and shows upon its face that the mortgage was duly acknowledged by the defendants upon the day of its date.

The defendant, Adelaide E. Hamilton, filed an answer, in which she avers that the land described in the mortgage was and is her separate property, and in which she also denies that she ever executed or acknowledged the mortgage, and further "alleges that the statement in the certificate of said notary, appended to said pretended mortgage by said notary, reciting and stating that she appeared before, or was in the presence of, said notary, ... is untrue and false."

The case was tried upon the issues thus presented, and resulted in a judgment for the plaintiffs in accordance with the demand of the complaint, and a decree of foreclosure directing the sale of the property mentioned in the mortgage to satisfy the amount adjudged to be due from defendants to plaintiffs on account of the note and mortgage.

The defendant, Adelaide E. Hamilton, appeals.

Upon the trial of the action the appellant offered to prove that she never in fact appeared before the notary certifying to the acknowledgment attached to the mortgage, and that she did not acknowledge the mortgage, or know any thing about its delivery to the plaintiffs. The plaintiffs objected

to this evidence upon the general ground of irrelevancy, and particularly because "it made no difference whether the defendant, Adelaide E. Hamilton, was present and acknowledged the mortgage or not, as the certificate of said acknowledgment was conclusive." The objection was sustained, and the appellant was not permitted to prove the facts embraced in her offer.

This ruling was clearly erroneous. At the date of the mortgage sought to be foreclosed an acknowledgment was essential to the validity of a conveyance by a married woman. Section 1187 of the Civil Code, as it then read, expressly declared that such a conveyance shall have no validity "until so acknowledged," and section 1093 of the same code also provided that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her unless the grant or instrument is acknowledged in the manner prescribed by sections 1186 and 1191." Such being the law at the date of the mortgage in question, it is at once seen that the facts offered to be shown were material and relevant, and struck as directly at the existence of the mortgage as would an offer to show that the signatures thereto were forgeries—the acknowledgment of appellant being as necessary a part of the execution of the mortgage by her as her signature. The certificate of acknowledgment was not conclusive evidence of the fact of acknowledgment, and such a certificate may be impeached by parol evidence that the person named therein never in fact appeared before the officer certifying to the acknowledgment. In such a case the act of the officer is wholly void, and the certificate is nothing but a fabrication: *Johnston* v. *Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Pickens* v. *Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *Donahue* v. *Mills*, 41 Ark. 421; *Meyer* v. *Gosset*, 38 Ark. 377; *Williamson* v. *Carskadden*, 36 Ohio St. 664; *Michener* v. *Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Borland* v. *Walrath*, 33 Iowa, 130. Of course when it appears that a married woman has actually appeared before an officer for the purpose of acknowledging a conveyance, and has made some kind of an acknowledgment, the certificate of the officer in relation to the manner and terms, and as to the fact of the acknowledgment, would be conclusive in favor of a purchaser in good faith, and who has relied upon the truth of the certificate. The difference between such a case and one where the certificate is wholly void is

very clearly pointed out by Campbell, J., in *Johnston* v. *Wallace*, 53 Miss. 331, 24 Am. Rep. 699, in the following language:

[536] "When a married woman appears before an officer to acknowledge her deed it is made by law his duty to inquire of her separately and apart from her husband as to her freedom from fear, threats, or compulsion of her husband in the execution of the deed; and it is his duty to decide upon this, and to certify the acknowledgment. His decision thus made and duly certified imports verity as to all persons acting on the faith of his official certificate in due form of law, and without any knowledge of any wrong or irregularity or of any circumstance to excite inquiry and point to such wrong or irregularity. The appearance of the person before him to acknowledge is the occasion for the performance of his duty by the officer; the proposal to acknowledge the deed before him is the circumstance which calls into exercise the legal power to examine as to the execution of the deed, and to decide the sufficiency of the statement made as to that; and then, in certifying, he is declaring his conclusion upon the fact he is called to decide. His official act thus solemnly performed must have sanctity, at least to the extent of being a safe reliance for every one who, in good faith, acts in the belief that it is true as stated. But where the person never appeared before an officer to acknowledge the deed, but he falsely certifies that she did, his act is wholly without authority of law, and void *in toto*. All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. Although liable to be deceived and imposed on by such an act, no one can claim that a married woman's estate should be divested by forgery; and when she did not in fact appear before the officer to acknowledge, although he may certify that she did, she may show she did not, for his act is wholly without authority, and she but rights herself and wrongs no one in proving the truth of the case, for no one can claim by virtue of a forgery."

The cases of *Banning* v. *Banning*, 80 Cal. 274, 13 Am. St Rep. 156, and *De Arnaz* v. *Escandon*, 59 Cal. 486, cited by respondents, are not opposed to the principle [537] declared in the case from which the foregoing quotation is made. In *Banning* v. *Banning*, 80 Cal. 274, 13 Am. St Rep. 156, the wife acknowledged the deed through a telephone, and afterwards delivered the deed, apparently properly acknowledged,

to the grantees, who were not shown to have had any notice of the manner in which the acknowledgment was taken. Under these circumstances the court held that the certificate was conclusive, and that the married woman could not avoid her deed because of the fact that she did not personally appear in the actual presence of the officer certifying to the acknowledgment. That was all that was decided there, and that case is authority for nothing more. It is true that the court quotes, with approval, the following portion of section 538 of Jones on Mortgages: "As to the statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." This, however, was not necessary to be said in the decision of that case, and the attention of the court was not called to the particular question we are now discussing, and for that reason the language above quoted cannot be construed as an authoritative statement by the court of the law which governs a case like this.

In *De Arnaz* v. *Escandon*, 59 Cal. 486, the facts were such as to bring it within the rule making the certificate of acknowledgment conclusive in favor of an innocent purchaser. In that case the wife actually appeared before the notary and acknowledged the deed through an interpreter, and afterwards delivered the deed to the grantee, who had no notice of the matters relied upon to defeat the acknowledgment. The court held that upon that state of facts the certificate of the notary was conclusive of the facts which it recited. The cases of *Hester* v. *Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Cover* v. *Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Singer Mfg. Co.* v. *Rook*, [538] 84 Pa. St. 442; 24 Am. Rep. 204, and *Baldwin* v. *Snowden*, 11 Ohio St. 203; 78 Am. Dec. 303, also cited by plaintiffs, were all cases in which the married woman had actually appeared before the acknowledging officer, and the attempt in each was to attack the certificate because of some defect in the manner of the acknowledgment, and neither of them can be considered as sustaining the proposition that a certificate cannot be impeached by evidence showing that the officer was entirely without authority to make it by reason of the fact that the person whose acknowledgment is certified never in fact appeared before the

officer for that purpose. We think the distinction between the cases last referred to and the one at bar is a very broad one.

Nor was it necessary for the appellant to show or offer to show any fraud or bad faith upon the part of the mortgagee, or that he had notice of the falsity of the certificate. If the matters offered to be proven in this case are true the appellant never executed the mortgage, and it has no more validity as to her than if her signature was forged thereto; and in such a case, if the wife has done nothing to estop her from showing the attempted fraud upon her rights, it is immaterial whether the persons claiming under the mortgage had notice of the matters affecting its validity or not. Their failure to ascertain that the mortgage was never in fact executed cannot be allowed to defeat the rights of appellant if she was in fact without fault. The plaintiffs were not obliged to advance any money on the mortgage until after first satisfying themselves of its genuineness, and if they failed to make the necessary inquiry, the loss is theirs, and not that of appellant: *Edgerton* v. *Jones*, 10 Minn. 427.

It is also claimed by respondent that the answer of appellant admits that she delivered the mortgages to plaintiffs, and, therefore, that the error of the court, if any, in excluding the evidence referred to is immaterial. The complaint alleges that defendants did "execute under their hands and seals and deliver" the mortgage [539] in suit, and appellant, in answering this particular allegation, denies that she executed the mortgage referred to, but does not supplement this with the further denial that she delivered it, and thus negativing the precise language of the complaint. The plaintiffs contend that the failure to use the word "deliver" in the denial referred to was a failure to deny the delivery alleged; but we do not think so. The word "execute" when applied to a written instrument, unless the context indicates that it was used in a narrower sense, as in sections 1185, 1186, 1189, 1190, and 1191 of the Civil Code, imports the delivery of such instrument: Code Civ. Proc., sec. 1933; *Joseph* v. *Dougherty*, 60 Cal. 358; *Clark* v. *Child*, 66 Cal. 87; *Bagley* v. *McMickle*, 9 Cal. 430. There is nothing in the answer to indicate that the word "execute" was there used in any restricted sense, and it must, therefore, be given its ordinary legal signification. The appellant denied that she executed the mortgage, and this put in issue the fact of the delivery, and

every other fact necessary to its execution. The plaintiffs did not, in the language used by them, allege any thing more than that the mortgage was executed, and when this was denied the allegation of the complaint upon this point, in its entire scope and meaning, was denied, notwithstanding the appellant did not see fit to notice the unnecessary verbiage contained in plaintiffs' complaint upon the subject of the delivery of the mortgage.

But a complete answer to the contention of respondent on this point is that the objection to this offered evidence was not rested upon the ground that the answer admitted the delivery of the mortgage by appellant, nor is there any thing in the record to suggest that the attention of the appellant was ever in any manner during the trial in the court below called to this alleged defect in her answer.

If it be assumed that the general objection to the effect that the offered testimony was "incompetent, irrelevant, and immaterial," if it had stood alone, would have been sufficient to raise such a question, a point [540] which it is unnecessary to decide at this time; still, such objection was obviously insufficient for that purpose when the particular ground upon which it was claimed that such offered evidence was incompetent, irrelevant, and immaterial, was stated to be "for the reason that the certificate of the notary was conclusive as to all matters therein contained, and could not be contravened or contradicted by any oral testimony."

There is certainly in this statement not even the most remote intimation that the offered evidence was then claimed to be inadmissible because of the failure of the answer to deny the delivery of the mortgage sued upon, and the respondent cannot successfully raise such an objection here for the first time.

Judgment and order reversed.

Fitzgerald, J., Paterson, J., Harrison, J., and Garoutte, J., concurred.

McFarland, J., concurring. I concur in the judgment of reversal; because the objections to the evidence offered by appellant, and sustained by the court, were not based upon any defect in the denials of the answer. The objections and ruling of the court were made solely upon the broad ground that a notary's certificate of acknowledgment of a married woman is always and under all conceivable circumstances

absolutely conclusive. Under this ruling the appellant, although she never appeared before the notary and never knew that he had made a certificate of her acknowledgment, and although she never delivered the mortgage or knew of its delivery, or received any of the money, and never did any act of ratification whatever, would still be forever estopped by the certificate from showing the truth. This, in my opinion, is not the law. At the same time, I do not think that the delivery of the mortgage is denied in the answer. It is true that, in a general sense, "execution" may be said to include "delivery"; but it is quite frequently used in the limited sense of signing, and where [841] the law requires it, sealing, stamping, acknowledging, etc., a written instrument, so as to make it complete on its face and ready for delivery. And the sense in which it is used can generally be seen from the context. In the case at bar the complaint avers that the defendants "executed under their hands and seals and delivered" the mortgage in question. Here "executed" was clearly used in the limited sense, and "delivered" intended as a distinct and additional averment. The answer denies that defendants "executed under their hands and seals," but either inadvertently or intentionally avoids any denial that they "delivered" the mortgage. Now, in answer to such an averment a married woman might truthfully deny the execution in the sense as used in the complaint, if she believed that the acknowledgment was defective; while she might not be able at all to truthfully deny the delivery. And in the case at bar, as appellant refrained from denying the delivery, I apprehend that she could not be convicted on a prosecution for perjury, however clearly it might be proven that she did deliver the mortgage. But, as said before, the point was not made at the trial. If objection had been made to offered evidence on the ground that the answer did not deny the delivery, appellant would have been allowed to amend her pleading—if she was really prepared to deny such delivery.

BEATTY, C. J. I concur in the opinion of Justice McFarland.

EVIDENCE—PAROL TO IMPEACH CERTIFICATES OF ACKNOWLEDGMENT.—Parol evidence is admissible to prove that the grantor did not appear before the officer taking the acknowledgment: *Smith* v. *Ward*, 2 Root, 378; 1 Am. Dec. 80, and extended note. The evidence of the party named in the certificate denying the genuineness or due execution of the instrument, may remove the presumption in favor of the facts recited in the certificate: *Moore* v.

Hopkins, 83 Cal. 270; 17 Am. St. Rep. 248. Parol evidence is inadmissible to prove that the acknowledgment of a *feme covert* was different from the certificate of her privy examination on record: *Barnett* v. *Shackleford*, 6 J. J. Marsh. 532; 22 Am. Dec. 100, and note; *Johnston* v. *Wallace*, 53 Miss. 331; 24 Am. Rep. 699. Parol evidence is not admissible to impeach a certificate of acknowledgment to a deed in the absence of fraud or imposition: *Graham* v. *Anderson*, 42 Ill. 514; 92 Am. Dec. 89, and note. See, also, the notes to *Jamison* v. *Jamison*, 31 Am. Dec. 541, and *Dodge* v. *Hollinshead*, 80 Am. Dec. 441.

ACKNOWLEDGMENTS OF MARRIED WOMEN—IMPEACHING.—The certificate of acknowledgment of a deed by a married woman may be impeached by proving that she never in fact appeared before the officer or acknowleged the deed to him: *Pickens* v. *Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622, and note. See the notes to the following cases: *Hartley* v. *Frost*, 55 Am. Dec. 774; *Michener* v. *Cavender*, 80 Am. Dec. 489; and *Baldwin* v. *Snowden*, 78 Am. Dec. 307.

LITTLE *v.* CALDWELL.

[101 CALIFORNIA, 553.]

ATTORNEYS AT LAW.—UPON THE DEATH OF ANY MEMBER OF A PARTNERSHIP OF ATTORNEYS at law the client may elect to consider the employment as terminated on the ground that the contract was for the personal services of all the members of the firm, but the option of terminating the contract for such a cause is with the client alone, and the surviving partners are bound to proceed, unless the client elects that they shall not do so.

A SURVIVING PARTNER MUST COMPLETE ALL EXECUTORY CONTRACTS of the firm remaining in force after the death of a partner, and settle all partnership business without charge against the partnership for his personal services.

ATTORNEYS AT LAW.—A SURVIVING PARTNER OF A FIRM OF ATTORNEYS at law is bound to complete all business undertaken or agreed to be done by the firm in the lifetime of the deceased partner, and without charge to the partnership for the services rendered in so doing.

ATTORNEYS AT LAW.—A SURVIVING PARTNER OF A FIRM OF ATTORNEYS at law occupies the position of trustee, and cannot be permitted to make gain for himself at the expense of the estate of the deceased partner by consenting to the extinction of a contract belonging to the partnership and the substitution of another therefor relating to the same subject matter, and in the profits of which he alone is to participate.

ATTORNEYS AT LAW.—AFTER THE DEATH OF A MEMBER OF A FIRM OF ATTORNEYS all unfinished business intrusted to the firm, and which the client permits the survivor to complete, constitutes an equitable asset for the proceeds of which he must account to the representatives of the deceased partner.

ATTORNEYS AT LAW.—IF, AT THE DEATH OF A MEMBER OF A FIRM OF ATTORNEYS AT LAW A NEW CONTRACT is entered into between the survivor and the client with respect to business intrusted to the partnership by which the survivor is to make advances and render services not contemplated in the original contract, and to receive additional

compensation, he is obliged as between himself and the estate of the deceased partner, to render without compensation all the services required by the original contract, and to account for the deceased partner's share of the profits thereof, but may retain for himself the additional sum to which he becomes entitled by the terms of the new contract made after his partner's death. No principle of equity is violated by his retention of the additional compensation arising out of the new contract, so long as the partnership is awarded all that could accrue to it under the old contract.

J. M. Walling, for the appellant.

A. D. Mason, for the respondent.

[556] DE HAVEN, J. This is an appeal by the plaintiff from a judgment rendered in favor of the defendant. The superior court sustained a demurrer to the complaint, and this ruling is assigned as error, and presents the general question as to whether or not the matters alleged [557] in the complaint are sufficient to entitle the plaintiff to maintain the action.

The plaintiff is the widow of L. B. Little, deceased, and in this connection the complaint alleges, in substance, that at and prior to the death of said Little he and the defendant were partners engaged in the practice of the law, and that during the existence of such partnership they entered into an agreement with certain persons claiming to be the heirs of one William Westerfield, deceased, by which the partners undertook to render their legal services to said claimants in the prosecution of an action to be brought for the purpose of establishing the heirship of said claimants, and recovering for them the property of said estate. This agreement was in writing, and, by its terms, the said Little and the defendant were to receive, as compensation for their legal services, in the event of a successful termination of the contemplated action, fifteen per cent of the amount of the property that should be recovered, the said heir claimants to pay all the expenses of the litigation.

The complaint further alleges that, under this agreement, the said Little and defendant, "after performing all acts preparatory thereto," instituted an action in the superior court of Nevada county for the purpose of having the said claimants adjudged to be the lawful and only heirs of William Westerfield, deceased, which action was tried and resulted in a judgment of the superior court adverse to such claimants, and thereupon the deceased, Little, and the defendant proceeded to perfect an appeal to this court from

such judgment, pending which appeal and upon March 2, 1890, the said Little died. The complaint then proceeds to allege that, after the death of Little, the plaintiff assigned to defendant her interest in the contract referred to, in consideration of his promise to pay her "what was right for her interest in the same," in the event of a recovery of the property for the claimants named in the contract; and, "thereafter, said heir claimants, finding it difficult to [558] procure sufficient funds with which to further prosecute said action and proceedings to recover said property, and still desiring to prosecute the same, paid to defendant the sum of two hundred dollars in part payment of said expenses, and then and there entered into an additional contract and agreement with said defendant, by the terms of which defendant was to furnish the balance of the money requisite to pay the expenses of such further proceedings in court, or otherwise, as might become necessary to recover said property of said William Westerfield, deceased, for said heir claimants"; and to receive therefor sixty per cent of the amount recovered, instead of fifteen per cent, as provided in the original contract; and "thereafter, such proceedings were taken and had by said defendant, under said contracts, that said claimants were adjudged to be the sole heirs of said William Westerfield, deceased," and the defendant received from such claimants the full compensation provided for in the additional or modified contract, amounting to the net sum of twelve thousand dollars, but refused to allow or account to the plaintiff for any greater sum than one hundred dollars.

The prayer of the complaint is for an accounting, and that plaintiff have judgment against defendant for the sum of five thousand nine hundred dollars.

We do not regard the averment that plaintiff assigned to defendant her interest in the original contract for the contingent fee in consideration of his promise to pay her what was right for such interest in the event of the final recovery of the property to which the contract related, as adding any strength to the other averments. If that contract did not survive the death of Little, and nothing had then been earned under it, the plaintiff, as the successor to his estate, had no interest in the contract to assign.

But aside from this consideration, the promise of defendant, as alleged, was in effect only a promise to pay, upon a settlement of the business growing out of the contract, the

amount to which she would be entitled as [559] the successor of the deceased partner, and the question of the nature or value of that interest is to be determined upon the general principles underlying the law of partnership, and if under such general rules the estate of the deceased partner would have no right to any portion of the contingent fee earned under the circumstances stated in the complaint the plaintiff ought not to recover.

It is urged here in behalf of defendant, and in support of the judgment of the superior court, that when Little died nothing had been earned under the contract made by the firm of Little and Caldwell with the heirs of the Westerfield estate, and that as the contract was one for the personal services of both defendant and Little, it terminated upon the death of the latter, and was in fact superseded by the subsequent agreement by which the defendant himself undertook to perform the legal services in the action then pending for the recovery of the Westerfield estate, for the clients named in the original contract, and also to bear all the costs attending the litigation; and it is further contended that the fee in controversy was the result of the latter contract in which the estate of Little has no interest.

It may be conceded that when a firm of attorneys is employed to conduct litigation, the client contracts for the services of all the members of the firm; and, while perhaps the spirit of such a contract does not require that all the partners shall personally participate in all the steps of the trial, if in their judgment it is not necessary so to do (*Eggleston* v. *Boardman*, 37 Mich. 14; *Phillips* v. *Edsall*, 127 Ill. 535), still such a contract is one so far for the personal services of all, that, upon the death of one member of the firm, the client may elect to consider the employment as terminated: *Wright* v. *McCampbell*, 75 Tex. 644; *McGill* v. *McGill*, 2 Met. (Ky.) 258. This would be the rule in controversies between the client and surviving members of the firm, where such election was properly made by the client; but the option to declare the contract terminated [560] for such a cause is with the client, and if he does not do so, but is willing to intrust the survivor with the further management of the litigation in which the firm was employed, the survivor is bound to complete the unfinished contract for the benefit of the partnership, and unless it was otherwise agreed upon between the partners, he would not be entitled to compensation from the

partnership, or from the estate of the deceased partner for his services in doing so. The rule is well settled in regard to commercial partnerships, that the surviving partner must complete all executory contracts of a firm which remain in force after the death of a partner, and must settle the business of the partnership without charge against the partnership for his personal services, and in the case of *Denver* v. *Roane*, 99 U. S. 359, it was said that none of the adjudicated cases recognize any distinction in this respect between such partnerships and those entered into between attorneys for the practice of their profession. And we know of no such distinction.

This obligation of the surviving partner is one of the risks assumed by him in entering into the partnership, unless otherwise specially agreed. In the discharge of this obligation or duty in relation to the unsettled and unfinished business of the firm, the surviving partner occupies the position of a trustee, and, while he may compromise disputed claims, or modify an existing contract by releasing the other party thereto from some of its obligations, when in the exercise of an honest judgment the best interest of the partnership seems to him to require such action, still, in doing so, he cannot be permitted to make gain for himself at the expense of the estate of the deceased partner, by consenting to the extinguishment of a contract belonging to the partnership, and the substitution therefor of another relating to the same subject matter, and in the profits of which he alone is to participate. Whatever may be the effect of such new or substituted contract as between the immediate parties to it, a court of equity in settling the accounts [561] of the partnership will not treat it as an entire extinguishment of the original contract, or deny the right of the representatives of the deceased partner to an equitable participation in the profits realized from the latter contract, and which may be regarded, so far as concerns the partnership, as only a modification of the former contract. This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member leaving contracts not fully performed, often constituting a large part of the assets of the partnership, and which it is the duty of the survivor, as far as possible, to complete and preserve for the benefit of the firm.

While it is certainly true when a professional partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the goodwill of the partnership, or for the profits of such future business as may have been given to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, and which the client permits the surviving partner to complete, such contract of employment, although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership; and it is none the less an equitable asset, when, as in this case, the compensation for such services is entirely contingent upon the final success of the litigation in which the services are to be rendered.

Applying the foregoing general principles to the facts of this case as stated in the complaint we have no difficulty in reaching the conclusion that the plaintiff is entitled to recover. The contract by which Little and defendant were employed to conduct the litigation referred to in the complaint did not *ipso facto* become extinguished upon the death of Little; the persons with whom it was made did not refuse to permit the defendant [562] to complete it because death had deprived them of the personal services of his deceased partner, but they desired for other reasons to modify it in such a manner as to relieve themselves from some of its burdens, and, in consideration of the assumption of such burdens by defendant, offered him an increased compensation in the event of final success; and when the defendant consented to this modification of the contract, the right of the estate of the deceased partner to share in the contingent fee to the extent given by the contract in its original form was not extinguished. The defendant was at liberty to consent to this modification, and, as the partnership loses no rights thereby, no principle of equity will be violated by permitting him to retain the increased compensation given in the modified contract by reason of the increased personal risk which he assumed.

It follows from these views that upon the facts, as stated in the complaint, the plaintiff is entitled to recover one-half of the fifteen per cent provided for in the original contract, after deducting all proper expenses chargeable to the partnership in the matter of conducting the litigation.

The complaint alleges that the defendant has paid the sum of two thousand five hundred dollars as attorney's fees in the prosecution of the action in which the contingent fee was recovered. If this be so, the partnership is properly chargeable with its proportion of the sum thus paid, viz., one-fourth, but the defendant is personally chargeable with the costs of the litigation assumed by him, and in consideration of which he is entitled to retain the increased compensation of forty-five per cent given by the modified contract.

The further contention of respondent that under section 1585 of the Code of Civil Procedure the defendant cannot be required to account to the plaintiff, but only to the executor or administrator of his deceased partner, cannot be sustained. It does not appear that any other [563] action for the same cause has been brought by the executor or administrator, and as the plaintiff, under the allegations of the complaint, is entitled to the entire estate of her deceased husband, she certainly has such an interest in the subject matter as entitles her to maintain the action.

Judgment reversed, with directions to the superior court to overrule the demurrer to the complaint.

MCFARLAND, J., and FITZGERALD, J., concurred.

PARTNERSHIP—ATTORNEYS—DISSOLUTION BY DEATH, WHETHER ENDS EMPLOYMENT.—Upon the death of a member of a law firm having unfinished business, the survivors have no right to insist upon continuing their services in the case against the will of the client, even though their fee has not been paid: *Wright* v. *McCampbell*, 75 Tex. 644. If one of the members of a firm of attorneys dies, the engagement is at an end, unless by its terms it is still to subsist, and the business is to be attended to by the survivors: *McGill* v. *McGill*, 2 Met. (Ky.) 258.

PARTNERSHIP—DISSOLUTION.—COMPENSATION SHOULD NOT BE ALLOWED A SURVIVING PARTNER for winding up the partnership business: *Beatty* v. *Wray*, 19 Pa. St. 516; 57 Am. Dec. 677, and note; *Brown* v. *McFarland*, 41 Pa. St. 129; 80 Am. Dec. 598, and note. A partner claiming compensation for personal services, and for closing the business after dissolution, must show that he performed a greater amount of labor than his partner to enable him to recover: *Redfield* v. *Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889, and note. See further on this subject, *Phelan* v. *Hutchinson*, Phill. Eq. 116; 93 Am. Dec. 602; and the notes to *Marsh's Appeal*, 8 Am. Rep. 212, and *Shields* v. *Fuller*, 65 Am. Dec. 301.

GRIFFITH *v.* NEW YORK LIFE INSURANCE CO.

[101 CALIFORNIA, 627.]

INSURANCE, LIFE—WAIVER OF PAYMENT.—A provision in a policy of insurance that the insurer shall not be liable thereon until the premium is actually paid is waived by an unconditional delivery of the policy to the assured as a completed contract under an express or implied agreement that credit shall be given.

INSURANCE, LIFE—CONTRACT FOR, WHEN NOT COMPLETE.—If it is agreed between an applicant for life insurance and a local agent that an application shall be sent to the insurer representing the premiums as paid in cash when in fact the agent has accepted premium notes, and the policy is issued and sent to such agent who, becoming distrustful of the financial solvency of the assured, enters into an agreement with him whereby the note is surrendered and the policy returned to the insurer and canceled, such policy has never become a perfected contract, and its surrender and cancellation, though without the assent of a person other than the assured named therein as beneficiary, prevent any liability from arising against the insurer if the applicant had agreed that any policy which should be issued under his application should not be enforced until the actual payment of the premium.

INSURANCE, LIFE—SURRENDER OF POLICY WITHOUT ASSENT OF THE BENEFICIARY.—If a policy of insurance is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life payable to another, the assured cannot surrender the policy without the consent of the beneficiary.

INSURANCE, LIFE—NONPAYMENT OF NOTE GIVEN FOR PREMIUM.—If insurance is effected on the life of the assured and a policy delivered on the assumption that the premium has been paid in cash, when such payment has in fact been made to a local agent by a note which he has received as cash, and he has become liable to his principal for the amount thereof, this, as against the insurer, is equivalent to proper payment to the local agent, and the nonpayment of the note at maturity cannot work a forfeiture of the policy, nor can it support a surrender of the policy made without the consent of the person named therein as beneficiary.

WAIVER OF STATUTORY RIGHT OF PROTECTION.—Where the object of a statute is to promote great public interests, liberty, or morals, it cannot be defeated by a stipulation made by one of the class of persons entitled to its protection.

INSURANCE, LIFE—WAIVER BY INSURER, STATUTORY RIGHTS.—If a statute declares that no life insurance company shall have the power to declare forfeited or lapsed any policy by reason of nonpayment of premiums, unless notice shall be given as in the statute stated, any contract between the company and the assured stipulating for a forfeiture of the policy in the absence of such notice is *ultra vires* and void. The statute indicates the legislative will that, as a matter of public policy, life insurance corporations shall be deprived of the power to declare forfeited policies of insurance for the nonpayment of premiums except in the prescribed mode, and a waiver on the part of the assured cannot be considered to confer a power which the statute has taken away.

ACTION to recover upon two policies of insurance alleged to have been issued by the defendant corporation on the life of the plaintiff's husband, E. J. Griffith. He, in June, 1889, made an agreement with the local agent of the defendant to deliver to such agent two promissory notes for the sum of four hundred and forty-nine dollars each, payable six months after date for the first annual premium on the two policies in suit. The policies were for ten thousand dollars each. One of the policies, though forwarded to the local agent, was not delivered to the assured, but was with his consent returned to the insurer, and the premium note therefor was canceled. The other policy was delivered to the insured and retained by him until after the note became due, and finding himself unable to pay it, he returned the policy to the agent of the insurer, and it was canceled by the company, and the note given for premium returned to the assured. The defendant was an insurance corporation incorporated under the laws of the state of New York, the statutes of which declared that, "No life insurance company doing business in this state shall have power to declare forfeited or lapsed, any policy here issued by reason of nonpayment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured at his last-known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all demands thereon will become forfeited and void, and that in case such payment should be made within the thirty days limited therefor, it should be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and that no such policy should in any case be forfeited until the expiration of the thirty days after the mailing of such notice." It was found by the trial court that no notice was given to the assured or to the plaintiff as prescribed by the statute.

J. P. Meux, T. C. Van Ness, and L. A. Redman, for the appellant.

Wilson and McCutchen, for the respondent.

624 SEARLS, C. This is an action by the appellant, as plaintiff, to recover from the defendant and respondent twenty

thousand dollars, interests and costs, upon two twenty-year endowment policies of insurance averred to have been issued by the defendant, an insurance company, for ten thousand dollars each, to and upon the life of E. J. Griffith, loss, if any, payable to his wife, Mary V. Griffith, or in case of her death to the representatives or assigns of the insured, and in the event of his [635] survival for the period of twenty years to him, the said Griffith. Griffith died within two years after the policies issued, and his wife, the beneficiary named therein, is the plaintiff and appellant herein.

The policies were issued, and all payments were to be made at New York, in the state of New York, where defendant is organized.

The cause was tried by the court without a jury, written findings filed, and a judgment rendered thereon in favor of defendant for costs, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

It is contended by the appellant: 1. That there was a perfect legal delivery of policy 793 (323,793), whereupon the right of the plaintiff as beneficiary so vested as to prevent the right of surrender upon the part of Griffith.

2. That the surrender of the policies by Griffith, without the knowledge and consent of the beneficiary, the plaintiff in this action, was void, and of no effect.

3. That the nonpayment of the second annual premium does not defeat the right of plaintiff to recover.

The court finds that this policy "was never delivered by said Mouser, or anybody else to the said Griffith, nor was said policy ever in the possession of, or under the control of, the said E. J. Griffith."

Counsel for appellant do not claim that the policy was ever in the physical possession of plaintiff; their contention is, that there was, as appears by the other findings, a consummated contract, and that it was, in legal contemplation, delivered.

This position is assumed upon the theory that the contract was consummated, and that thereupon an interest in the policy vested in the plaintiff as beneficiary, which could not be divested by Griffith without her consent.

As a general rule, applicable to the ordinary policies of life insurance, "where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay [636] the premiums,

has no authority, by will or deed, to change the designation of title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the persons originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur": Bliss on Life Insurance, sec. 339; *Gould* v. *Emerson*, 99 Mass. 154; 96 Am. Dec. 720; *Chapin* v. *Fellowes*, 36 Conn. 132; 4 Am. Rep. 49; *Fraternal Mut. L. I. Co.* v. *Applegate*, 7 Ohio St. 292; *Ruppert* v. *Union Mut. Ins. Co.*, 7 Rob. (N. Y.) 155. As an apparent exception to this rule, it was held in *Bowman* v. *Moore*, 87 Cal. 306, that a change of beneficiary in a mutual benefit association, the by-laws of which provided therefor, made according to such by-laws, was a valid substitution.

Another proposition which may be considered as established is this: An express provision in a policy of insurance, that the company shall not be liable on the policy until the premium is actually paid, is waived by the unconditional delivery of the policy to the assured, as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and in such a case the company insuring is liable for a loss which may occur during the period of credit: *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and cases cited.

These propositions are stated as prescribing limitations upon the insurers in cases where the contract is fully consummated, but do not go to the essential point in our present inquiry, viz: Was it so consummated as to bind the insurer?

Griffith desired two policies of ten thousand dollars each. The solicitor of defendant was willing to procure them, and take his notes at three months for the premium for the first year.

627 The applications were sent to defendant at New York representing the premiums as paid in cash. The policies were forwarded to the manager in San Francisco, and by him through the general agents to the local agent at Fresno. This local agent has in the mean time become skeptical as to the solvency of Griffith, and as he and the California agents will be held personally responsible to the company in case the notes are not paid he delivers one of the policies, and with

the consent of Griffith declines to deliver the other, surrenders the note for the premium therefor, and returns the policy in question, which is canceled by the company.

Plaintiff's rights in the premises only vested when the contract was consummated. Griffith was under no legal obligation to procure the policy for her. He was to pay the premium from his own funds, and might stop short of doing so, or, having paid the first annual premium, might allow the policy to lapse for the want of payment of subsequent premiums.

The most that can be said is that had he consummated the contract it would have inured to the benefit of the plaintiff; and although his acts were purely voluntary, he would have been regarded as the agent of the plaintiff in their performance, and defendant would have been estopped from denying such agency. As long as the contract remained executory, Griffith and defendant, or its agents, could by mutual consent decline to complete it without consulting the plaintiff, who could only become a beneficiary upon its completion.

Griffith had not only represented in his statement that the first annual premium had been paid in cash, but he had also agreed in the same statement "that any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of, the premium by said company or its authorized agent during my lifetime and good health."

We may concede that this agreement might have been waived by a delivery of the policy without such payment, but it by no means follows that the same result ess follows without a delivery, or that the agent would be legally bound to deliver without payment. In such a case it is the act of delivery with intent that it shall take effect that constitutes the waiver and raises an estoppel against the insurer, and where the intent and act are wanting there is no waiver.

Up to the time of delivery the agreement to give credit was a mere personal one on the part of the solicitor, without authority from defendant, which he might and did cancel with the consent of Griffith before consummation of the contract.

It follows from these views that the finding of the court that policy No. 793 (323,793) was not delivered is one of fact, and not a conclusion of law as claimed by appellant, and that the additional facts found by the court are in harmony

therewith, and as a sequence, that the first contention of the appellant cannot be maintained.

2. Was the surrender of the other policy, 323,792, which we will designate as 792, by Griffith void as against the plaintiff?

It is conceded that this policy was delivered to Griffith and retained by him from July, 1889, to January 30, 1890, when being unable to pay the note given by him for the first year's premium when it fell due, he requested Mouser, the local agent of defendant, to return the note to him, and that he be permitted to surrender the policy, all of which was done, and the policy returned to defendant and canceled as for want of payment of the premium.

So far as appears defendant had no knowledge of the giving of the note, except what is to be inferred by the knowledge and acts of its agents in California. The findings are full upon this branch of the case.

We think the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract, to one who has procured insurance upon his own life, payable to another, the insured cannot surrender the policy without the consent of the [838] beneficiary: *Pilcher* v. *New York Life Ins. Co.*, 33 La. Ann. 322; *Trager* v. *Louisiana Eq. Life Ins. Co.*, 31 La. Ann. 235; *Whitehead* v. *New York Life Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787; *Schneider* v. *United States Life Ins. Co.*, 123 N. Y. 109; 20 Am. St. Rep. 727; *Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266; *Ricker* v. *Charter Oak L. Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289; *National L. Ins. Co.* v. *Haley*, 78 Me. 268; 57 Am. Rep. 807; *Harley* v. *Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Hubbard* v. *Stapp*, 32 Ill. App. 541; *Packard* v. *Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469; *Central Bank* v. *Hume*, 128 U. S. 195.

We do not understand counsel for respondent to seriously combat this proposition. Their theory is, that the giving of a credit was, at most, an extension of time for payment, and that when the promissory note of Griffith fell due, and was not paid, the clause in the policy which provided that it should not take effect until payment of the premium became operative, and the policy lapsed for nonpayment.

There are numerous cases reported in which policies have been held to be forfeited for nonpayment of premium notes; but, so far as observed, they are all cases where the insurers might, under their charters, or were accustomed to take such

notes, and in which the policies provided for a forfeiture upon a nonpayment thereof.

The agents of defendant were not authorized by defendant to take any thing except money in payment of premiums. They did consent to take the note in question in lieu of money, the effect of which, according to the evidence, was, that they became individually liable to defendant for so much money, less their commissions.

It was in effect, so far as defendant was concerned, a payment of the premium to the agents who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment. The note was payable to order, duly indorsed, and, so far as appears, in no way referred to the premium or policy.

Under such circumstances, its nonpayment at maturity did not work a forfeiture of the policy, or defeat its validity: *Lebanon Mut. Ins. Co.* v. *Hoover*, 113 Pa. 591; 57 Am. Rep. 511; *Universal Fire Ins. Co.* v. *Block*, 109 Pa. 535; *Boehen* v. *Williamsburgh City Ins. Co.*, 35 N. Y. 131; 90 Am. Dec. 787; *Miller* v. *Brooklyn Life Ins. Co.*, 12 Wall. 285; *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

3. Did the nonpayment of the second annual premium, which fell due June 1, 1890 (but upon the payment of which a grace of one month was by the terms of the policy allowed), work a forfeiture of the policy?

The law of the state of New York under which this policy issued is set out in the twelfth finding of the court, and need not be repeated. It is also found that the defendant did not give the notice as required by said statute.

In avoidance of this statute, and as a waiver of the notice there provided for, respondent relies upon the following clause in the policy:

"Notice that each and every payment of premiums is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived."

The policy also provided as follows: "That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company."

Such provisions as the law prescribes for the advantage or protection of individuals may, as a rule, be waived by them, where not inhibited by public policy.

"Where no principle of public policy is violated, parties are at liberty to forego the protection of the law": Sedgwick on Statutory and Constitutional Law, 109.

[641] Where, however, "the object of a statute is to promote great public interests, liberty, or morals, it cannot be defeated by any private stipulation": Sedgwick on Statutory and Constitutional Law, 110; Civ. Code, sec. 3268; Code Civ. Proc., secs. 406, 434, 631; *Bowen* v. *Aubrey*, 22 Cal. 566, and cases there cited.

In *Caffery* v. *John Hancock etc. Ins. Co.*, 27 Fed. Rep. 25, it was held in substance that where an act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy shall remain in force for a certain time for the full amount thereof, "any thing in the policy to the contrary notwithstanding," the statute might be waived by the express agreement of the parties by the substitution of a nonforfeitable policy of a different character, and that, as the waiver was a part of the original contract, the beneficiary was bound by the waiver.

In *Desmazes* v. *Mutual Ben. L. Ins. Co.*, 7 Ins. Law. J. 926, a like question was discussed, Clifford, J., using the following language:

"Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had, outside the statute, to waive the nonforfeiture provisions, if the other party consented."

The case passed off upon a different point, and is only useful as indicating the opinion of an able jurist. There are other cases bearing more or less directly on the subject, tending to uphold the same general doctrine. It would seem, however, that the New York statute was intended to cut deeper, and as a matter of public policy to inhibit forfeitures by life insurance companies, except by the method therein provided.

"No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy by reason of nonpayment of premiums," etc., except as therein provided.

The statute is a limitation on the power of the company to do a specified thing, except under prescribed [642] conditions.

That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires*, and void.

Admit that Griffith attempted to waive all notice of nonpayment of premiums, if the power was lacking in the corporation to declare a forfeiture in consequence thereof it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver—consent never gives jurisdiction not otherwise possessed of the subject matter to a court, for the reason that it lacks the power to adjudicate such subject matter, except as conferred by law.

A corporation being the creature of the law must confine its functions to the limits prescribed for its action, and if the law expressly inhibits it from doing a given thing it is powerless to do that thing, and, if it can do it only in a given manner, the prescribed method becomes the measure of its power.

We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights.

The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for nonpayment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away.

The reasons for such a policy are so numerous and obvious, that it is not deemed necessary to occupy time and space in specifying them. The conclusion is reached that, as no notice was given by defendant, the policy was not forfeited by failure to pay the annual premium which fell due June 1, 1890. It follows from these views that the judgment of the court below, so far [643] as applicable to policy No. 323,793, was correct, and should be affirmed; that the judgment so far as applicable to policy No. 323,792, is erroneous, and should be reversed; and, as the findings are full and complete, the court below should be directed to enter judgment in favor of plaintiff and against the defendant for the amount due upon policy No. 323,792, viz., for ten thousand dollars, and inter-

est, less the amount of two annual premiums of four hundred and ninety-nine dollars each, and interest thereon from the date when they respectively fell due, viz., June 1, 1889, and June 1, 1890, and without costs to either party on this appeal.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment of the court below in favor of defendant upon policy of insurance No. 323,793 is affirmed. It is further adjudged that the judgment of the court below in favor of the defendant upon policy No. 323,792 be, and the same is hereby, reversed, and the court below directed to enter judgment in favor of plaintiff and against the defendant for the amount due on said policy No. 323,792, to wit, ten thousand dollars, and interest thereon, less the amount of two annual premiums of four hundred and ninety-nine dollars each, and interest thereon from the date when they respectively fell due, viz., June 1, 1889, and June 1, 1890, and that the parties pay their own costs on this appeal.

HARRISON, J., GAROUTTE, J., PATERSON, J.

INSURANCE—WAIVER OF PAYMENT OF PREMIUM.—A provision in an insurance policy that the company shall not be liable thereon until the premium is actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract under an agreement that a credit shall be given for the premium: *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note; *Southern etc. Ins. Co.* v. *Booker*, 9 Heisk. 606; 24 Am. Rep. 344. See the extended notes to *Whiting* v. *Massachusetts Ins. Co.*, 37 Am. Rep. 320; *Meyer* v. *Knickerbocker etc. Ins. Co.*, 29 Am. Rep. 205, and *Levy* v. *Peabody Ins. Co.*, 27 Am. Rep. 602.

INSURANCE, LIFE—SURRENDER OF POLICY WITHOUT CONSENT OF BENEFICIARY.—A policy of life insurance creates a vested interest in the beneficiaries, and although the contract may be annulled by the company for a failure on the part of the insured to fulfill his contract, the latter himself is without the power of revocation: *Hooker* v. *Sugg*, 102 N. C. 115; 11 Am. St. Rep. 717, and note; *Whitehead* v. *New York etc. Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787.

INSURANCE—NONPAYMENT OF PREMIUM—WAIVER OF FORFEITURE BY ACT OF AGENT.—The insured is not bound to take notice of the condition in a policy, that the premium must be actually paid, nor that the waiver of condition must be indorsed in writing on the policy, when it is executed and delivered to him as a valid and completed contract by an agent having authority to countersign it, and who, before or at the time of the delivery of it, has given the insured a credit upon the premium by parol: *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note. The general agent of an insurance company may waive a condition in the policy that no insurance shall be considered as binding until the actual payment of the premium: *Sheldon* v. *Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 213,

and note; *Southern etc. Ins. Co.* v. *Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Young* v. *Hartford etc. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784; *Boehen* v. *Williamsburg etc. Ins. Co.*, 35 N. Y. 131; 90 Am. Dec. 787, and note. Where it is the custom of an insurance company to give its agent time to pay over premiums on policies, and it is the custom of the agent to give the insured a short credit therefor, the insured becoming a personal debtor to the agent, and the agent to the company, a payment in accordance therewith even after loss will be valid in spite of a provision avoiding the policy for nonpayment of premium: *Lebanon etc. Ins. Co.* v. *Hoover*, 113 Pa. St. 591; 57 Am. Rep. 511, and extended note. But see *Sheldon* v. *Connecticut etc. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565; and the notes to *Menk* v. *Home Ins. Co.*, 9 Am. St. Rep. 163, and *Cotton States etc. Ins. Co.* v. *Lester*, 35 Am. Rep. 125.

SECULOVICH *v.* MORTON.

[101 CALIFORNIA, 673.]

LACHES.—If at the time a conveyance is made to an infant a parol agreement is entered into between his father and the person paying the consideration for the conveyance that in the event of the death of the child while a minor and the father becoming its heir, the latter would, on demand, convey the property to such person, and the child some four years afterwards and while an infant dies, and the father thereupon in the same year removes from the state and continues absent therefrom, and a demand for a conveyance is made upon him twenty-four years later, and an action then begun to compel such conveyance, such action is barred by the laches of the complainant, though, owing to the absence of the defendant from the state, no statute of limitations is applicable to the suit.

LACHES.—Though, as a general rule, the statute of limitations does not run against an express trust where there is concealed fraud, yet, if the injured party has been guilty of great laches in the prosecution of his remedy, he will be barred in equity on account of the paramount importance of having title settled.

Moses G. Cobb, for the appellant.

A. C. Freeman, for the respondent.

[676] PATERSON, J. On January 16, 1862, plaintiff purchased and caused to be conveyed to George H. Morton, infant son of defendant, a certain lot of land in the city and county of San Francisco, upon the parol agreement that if the child should die unmarried and without issue before he arrived at the age of twenty-one years, defendant, after distribution of the property to him as heir, would, on demand of plaintiff, immediately convey the same to the latter. The child died when a little over five years of age—December 16, 1866—but no demand was made by plaintiff for a conveyance until

February 14, 1890. In February, 1891, this action was brought for judgment declaring that defendant holds the land in trust for plaintiff, and requiring him to convey the same. A demurrer to the complaint was sustained, and, plaintiff failing to amend, judgment was entered in favor of defendant.

[677] It is claimed that the cause of action stated is not stale or barred by the statute of limitations, because it is alleged in the complaint that within six months after the death of George H. defendant left this state, and has ever since resided in the state of Maryland, where the demand above referred to was made upon him February 14, 1890.

We think the demurrer was properly sustained. The defendant's absence from the state did not deprive the plaintiff of a remedy. He might have invoked the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of a commissioner to convey the property to him: *Perkins* v. *Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67; *Applegate* v. *Lexington etc. M. Co.*, 117 U. S. 266; *Arndt* v. *Griggs*, 134 U. S. 320; *Adams* v. *Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74; *Felch* v. *Hooper*, 119 Mass. 52.

Irrespective of the question whether the defendant's absence from the state prevented the running of the statute of limitations, we think the judgment of the court below was right, because the plaintiff did not make a demand within a reasonable time. Failing to do so, his cause of action became barred by his laches. True, it is a general rule that the statute does not run against an express trust where there is concealed fraud; but when the injured party has been guilty of great laches in the prosecution of his remedy he will be barred in equity on account of the paramount importance of having titles settled: *Godden* v. *Kimmell*, 99 U. S. 202; *Hume* v. *Beale*, 17 Wall. 348; *Bell* v. *Hudson*, 78 Cal. 287; 2 Am. St. Rep. 791; *West* v. *Russell*, 74 Cal. 544; *Chapman* v. *Bank of California*, 97 Cal. 159.

Judgment affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

LACHES.—APPLICATION OF THE DOCTRINE OF AS APPLIED TO TRUSTS: See the extended note to *Bell* v. *Hudson*, 2 Am. St. Rep. 799–801.

LIMITATIONS OF ACTIONS—EXPRESS TRUSTS.—Time does not run against the *cestui que trust* of an express trust, either at law or in equity: *Thomas* v. *White*, 3 Litt. 177; 14 Am. Dec. 56; *Pratt* v. *Thornton*, 28 Me. 355; 48 Am.

Dec. 492, and note. The statute of limitations does not operate in the case of an express trust: *Haynie* v. *Hall*, 5 Humph. 290; 42 Am. Dec. 427, and note; *Lexington etc. Ins. Co.* v. *Page*, 17 B. Mon. 412; 66 Am. Dec. 165, and note; *App* v. *Dreisbach*, 2 Rawle, 287; 21 Am. Dec. 447; *Williams* v. *McKay*, 40 N. J. Eq. 189; 53 Am. Rep. 775; *Commonwealth* v. *Molts*, 10 Pa. St. 527; 51 Am. Dec. 499, and note. The statute of limitations does not begin to run in the case of an express trust until a repudiation of the trust: *Fox* v. *Tay*, 89 Cal. 339; 23 Am. St. Rep. 474, and note. As between the *cestui que trust* and the trustee of an express trust, the statute of limitations does not run as long as the trust continues: *Miles* v. *Thorne*, 38 Cal. 335; 99 Am. Dec. 384, and note; *Decouche* v. *Savetier*, 3 Johns. Ch. 190; 8 Am. Dec. 473. See further the notes to *Maxwell* v. *Barringer*, 28 Am. St. Rep. 672, and *Frame* v. *Kenny*, 12 Am. Dec. 373.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

DELAWARE.

COYLE *v.* MCINTIRE.

[7 HOUSTON, 44.]

A MUNICIPAL CORPORATION MAY BE DEFINED TO BE a body politic and corporate established by law to assist in the government of the state, with delegated authority to regulate and administer to the local and internal affairs of a city, town, or district which is incorporated.

PUBLIC CORPORATIONS FOR THE GOVERNMENT OF A TOWN, CITY, OR THE LIKE are to be governed according to the law of the land. They are mere creatures of public institution created exclusively for the public advantage without endowments other than such as the government may bestow upon them.

A MUNICIPAL CORPORATION HAS NO VESTED RIGHT to any of its powers or franchises, but is subject to the control of the legislature, which may enlarge or diminish its territorial extent or its functions, and change or modify its internal arrangement, or destroy its very existence at discretion.

MUNICIPAL CORPORATIONS.—THE RIGHT OF PROPERTY OF A MUNICIPAL CORPORATION is not a private right of property in the sense in which property is said to be private, when held by an individual citizen. The property of a municipality is private only in the sense that it is exempt from being taken and applied to any other public use by the state or by authority of the state without compensation being made, and from being taken away and given to other corporations or persons.

MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL OF PROPERTY OF.—There is no limit to the control which the legislature may exercise over property acquired and held by a municipal corporation, provided such control is consistent with the preservation of the property or of its proceeds for the uses and purposes for which it was acquired and the benefit of those for whom it was acquired.

MUNICIPAL CORPORATIONS—WATER WORKS—LEGISLATIVE CONTROL OVER. A statute creating a board of water commissioners for a city and turning over to such board the water works and appliances already existing, and authorizing the board to take measures to plan and construct further works, and to charge the city for water furnished for the extin-

guishment of fires, and to fix and collect rates for water furnished private persons, is not unconstitutional as depriving the municipality of water rights, nor as devoting its property to purposes and objects other than those for which it was acquired.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—VESTED RIGHTS.—The common council of a city cannot, as against the state, have any vested or constitutional right to control or manage its water-works or to appoint those who are to maintain and control them. The legislature may direct these powers to be vested in or exercised by any other department or agency of the city government.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW.—ALL THE AGENCIES OF THE STATE MAY BE ABOLISHED or changed at the will of the legislature, and even their functions may be assigned to other and different agencies.

Edward G. Bradford, Jr., Benjamin Nields, and W. C. Spruance, for the plaintiff in error.

Ignatius C. Grubb, George H. Bates, and George Gray, for the defendants in error.

84 SAULSBURY, C. On the eighteenth day of April, 1883, the general assembly passed an act to establish a board of water commissioners for the city of Wilmington and for other purposes.

The act authorizes the city of Wilmington, through the agency of the board of water commissioners thereby created, constituted, and appointed, and their successors in office, to take, convey into, and throughout said city the water of the Brandywine river from any point on said river or other wholesome water, and also to acquire and hold lands, real estate, or personal property necessary for constructing aqueducts, lay pipe, constructing reservoirs, erecting buildings and machinery proper for the said works, and for purifying, conducting, storing, and distributing such water, and to purchase, take, and hold lands and water rights, for supplying the citizens with good and wholesome water.

Three citizens of Wilmington were appointed and constituted a board of water commissioners for the said city under the act. Their terms of appointment were limited to two, four, and six years.

At the expiration of the term of the said commissioner who should draw the shortest term and biennially thereafter the place of the retiring commissioner was to be filled by appointment by the mayor of the city of Wilmington for the term of six years. The said board of water commissioners was to have control of all matters relating to water supply in the city of Wilmington, of the management and direction the

water-works then existing or thereafter to be constructed in connection therewith; to have charge and supervision of all mains, stop-cocks, and fire hydrants and other fixtures appertaining to the distribution of water through the city and of the collection of all revenues due, or to become due, to the city of Wilmington for water, or accruing to the said city on account of the water-works thereof, in virtue of any ordinance then existing; or of any rules and regulations thereafter to be passed by said board.

[as] The ordinances of said city then in force relating thereto were to continue in force until the same should be changed in whole, or in part, by the said board of commissioners. And all officers of the water department of said city were to be, from the time of the organization of said board of commissioners, under and subject to the control of the said board. And the terms of office of all the said officers were by the said act made subject to termination at the pleasure of said board, all such officers were to continue to perform the duties then devolved upon them by the ordinances of said city until the board should otherwise direct; and all books, accounts, and property connected with the water department of said city or any office therein were to be used and disposed of according to the directions of said board.

The said board of water commissioners were by said act authorized at its discretion to appoint, employ, and discharge all officers, agents, ministers, and servants necessary for the management and service of the water-works, and for the collection of the revenues arising therefrom as the said act provided.

The said board were with all dispatch to prepare and resolve upon a plan for the permanent water-works, best suited to the circumstances of the city of Wilmington, capable of affording an ample daily supply for the inhabitants of the city; and to acquire for the city of Wilmington by contract, or otherwise, as in said act provided, all such real estate as might be needed for the construction of such extended water-works; the title of any real estate so purchased to be vested in the mayor and council of the city of Wilmington.

The said board of water commissioners were to have the right to charge the city of Wilmington with all water furnished each fire hydrant at the rate of forty dollars per annum, or the city was in lieu thereof to pay to the water commissioners a sum of money as might be agreed upon by the

city council and said board, provided that in no case should the city pay less than twenty thousand dollars per annum.

For the purpose of defraying all the costs of acquiring real estate for reservoirs, laying pipe, purchasing engines, constructing all the works contemplated by the act, and purchasing water rights it was made the duty of the city of Wilmington, on the requisition of said board of water commissioners, to issue bonds, each for the sum of one hundred dollars, or multiples of one hundred, payable in not more than thirty-five years from date of issue, to be denominated Wilmington city bonds to an amount not exceeding one hundred and twenty thousand dollars, bearing interest not exceeding five and one-half per cent per annum, which bonds the board of water commissioners might sell and dispose on the most advantageous terms possible.

The proceeds of the sale of all such bonds and also the revenue derived from the water-works were to be received by said board of water commissioners and placed on deposit in such bank at Wilmington as should from time to time be the depository of the funds of the city to the credit of said board, and all money to be disbursed thereon on account of said water-works was to be drawn upon warrant signed by the president of said board, and countersigned by the city treasurer and city auditor.

The water rates were required to be fixed by the said board of water commissioners at prices that should produce revenue sufficient at least to pay the interest on the water bonds and the running expenses of the water-works, and the whole net income, rents, and receipts of said water-works in excess of what might be necessary for completing, constructing, operating, and repairing the water-works, for extending the water-pipes and for interest on water bonds were to be set apart by the said board and solely appropriated to and for the payment of the principal and interest of the water bonds, and should be applied solely to that purpose until the whole of said bonds should be fully paid.

The city council were required during the month of December in each and every year to notify the board of water commissioners of the amount of interest due and payable during the ensuing year on all loans created for the benefit of the water-works, stating the time when due and the amount of interest payable, and the board of water commissioners were required to pay to the city the amount of interest due in each

year, such payment to be made at least ten days before said interest was payable to the holders of any water loans.

The present controversy results from the passage of this act by the legislature.

It is unnecessary to review the history of the legislation of the state conferring upon the corporation of Wilmington authority [87] in relation to the supply of water to that city. Such legislation seems to have commenced in 1799, and to have continued from time to time to the present.

Water-works existed in the city of Wilmington prior to and at the time of the passage of the act referred to as being the occasion of the origin of these proceedings.

These water-works belonged to, and were under the control of, the corporation. David H. Coyle, the plaintiff in error, was chief engineer of said works by appointment of the proper authorities at the time of the passage of the act to establish a water commission. The commission appointed by the act having qualified for the discharge of their duties as commissioners thereunder removed the said Coyle as such chief engineer and appointed Henry B. McIntire, the defendant in error, in his place and stead. Coyle refused to surrender his office as chief engineer and the property connected therewith to said McIntire in accordance with demand made upon him under the resolution adopted by the commissioners, and thereupon the attorney general of the state, on the relation of Henry B. McIntire, filed an information in the nature of a *quo warranto* in the superior court in and for New Castle county against him.

Judgment against the defendant was by agreement entered in the court below and a writ of error thereon sued out to this court.

The cause was very fully argued at the present term, and it now becomes our duty to decide as to the rights of the parties to the proceeding.

While we have carefully examined all the authorities cited to us by counsel on both sides, and maturely considered the positions assumed by each, we deem it unnecessary to review at length those cases, but shall confine ourselves to the consideration of such general principles as we consider necessarily involved in the determination of the cause and properly deducible from the authorities applicable thereto.

The plaintiff in error contends that the act of the legislature to establish a board of water commissioners is unconstitutional

and void. His counsel, in their very able argument, maintained in substance that a municipal corporation is of a dual character, and possesses two classes of powers and two classes of rights, public and private; that in all that relates to one class it is merely the [88] agent of the state and subject to its control, and that in the other it is the agent of the inhabitants of the place, and not subject to the absolute control of the legislature, its creator; that among the latter is the right to acquire, hold, and dispose of property to sue and be sued, just as certain rights are conferred upon private corporators and persons not *sui juris*, such as minors and married women, but are not afterwards as long as they exist under legislative control.

They maintain in effect that the act is unconstitutional as being repugnant to that provision of the constitution of this state which provides that no man shall be deprived of his property except by due process of law. They contend that what they say is the private property of a public corporation is held by such corporation under all the constitutional guarantees as similar property would be protected by in the hands of individual owners and properties, and this protection exempts a public corporation, as to its water-works, from the regulation and control of the state as effectually as against trespass and wrong committed by individuals.

This is in effect the position of the plaintiff in error.

The questions involved in this case necessarily lead to the consideration of the nature, character, and powers of corporations, private and public.

A corporation is a legal institution devised to confer upon the individuals of which it is composed powers, privileges and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession under the corporate name, notwithstanding successive changes by death or otherwise in the corporations or members of the corporation.

It is a legal person with a special name composed of such members and indorsed with such powers and such only as the law prescribes: Dillon on Municipal Corporations, 25.

It is an artificial being, invisible, intangible, and existing only in contemplation of law: *Dartmouth College case*, 4 Wheat. 637.

Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it

either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is created.

Corporations are of two kinds, public and private. "Private corporations," says Cooley, "are created for private as distinguished from purely public purposes, and they are not in contemplation of law public, because it may have been supposed by the legislature that their establishment would promote either directly or consequentially the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative, but when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or be destroyed by any subsequent act of legislation unless the right to do so was reserved at the time."

By the nineteenth section of the second article of the constitution of this state, it is declared that "no act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence by two-thirds of each branch of the legislature, and with a reserved power of revocation by the legislature; and no act of incorporation which may hereafter be enacted shall continue in force for a longer period than twenty years without re-enactment of the legislature, unless it be an incorporation for public improvement."

"Corporations," says Cooley, "intended to assist in the conduct of local self-government, are sometimes styled political, sometimes public, sometimes civil, and sometimes municipal, and certain kinds of them, with very restricted powers, *quasi* corporations—all these by way of distinction from private corporations."

Thus an incorporated school district or county as well as city is a public corporation; but the school district or county is not, while the city is, a municipal corporation.

All municipal corporations are public bodies created for civil or political purposes; but all civil, political, public corporations are not in the proper use of language municipal corporations.

A municipal corporation may be defined to be a body politic and corporate established by law to assist in the civil government of the state with delegated authority to regulate

and administer [90] the local or internal affairs of a city, town, or district which is incorporated.

"A body politic," says Lord Coke, "is a body to take in succession, formed as to its capacity by policy," and is therefore called by Littleton (secs. 4, 13) a body politic. It is called a corporation or body corporate because the persons are made into a body politic, and are of capacity to take, grant, etc., by a particular name.

Public corporations for the government of a town, city, or the like, being for public advantage, are to be governed according to the law of the land. They are the mere creatures of the public institution, created exclusively for the public advantage, without other endowments than such as the government may bestow upon them.

"It would seem reasonable," says Mr. Justice Washington, in *Dartmouth College* v. *Woodward*, 4 Wheat. 661, "that such a corporation may be controlled and its constitution altered and amended by the government in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it." There is in fact no contract in any just sense of that word, and public municipal corporations are not founded on contracts.

The city of Wilmington is a public corporation. It is a municipal corporation which is, as we have seen, an incorporation by the authority of the state of the inhabitants of a particular place or district, and authorizes them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns.

The style and name of the corporation is the mayor and council of Wilmington, and it is declared by its charter that by that name they shall be and are hereby made able and capable in law, to have, take, purchase, receive, possess, enjoy, and retain to them and their successors, lands, tenements, hereditaments, goods, chattels, and effects of what kind, nature, or quality soever, and the same to sell, grant, demise, alien, or dispose of, to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity, or any other place whatsoever, and also to make, have, and use a common seal, and the same to break, alter, [91] and renew at their pleasure, gen-

erally to have all the privileges and franchise incident to a corporation or body politic.

Because it is a municipal corporation the plaintiff in error contends that its inhabitants are constitutionally entitled to all the rights and privileges of independent local self-government, and that all the property which the corporation is capable to have, take, purchase, receive, and possess not necessary for the discharge of purely governmental purposes is as against the state, as well as against individuals, subject to the absolute and uncontrolled possession of the corporation as solely and absolutely as is the property of a purely private corporation or of a private individual. And that the provision of our constitution guaranteeing the rights of property to the owners thereof is applicable to such property and its owners, equally as to like property when owned by private individuals.

The theory of the plaintiff in error, as presented and discussed by his counsel, is a beautiful one. It has all the charm which attaches to the principle of local self-government.

Whether the universal recognition by legislative and judicial tribunals as applicable to municipal corporations would be attended by all the advantages, and result in all the beneficial consequences supposed by its advocates, can only be determined when human experience in this respect, if ever, may safely be invoked as a final arbiter.

Does the law, as the court should determine it to be, support the plaintiff's theory?

All that is absolutely necessary for us to say upon this subject is this: The corporation of the city of Wilmington, that is the people residing in the district known as the city of Wilmington, the name and style of whose corporation, that is the incorporation of the persons and inhabitants of that particular place, is the mayor and council of Wilmington, is merely an agency instituted by the state for the purpose of carrying out in detail the objects of government. It is essentially a revocable agency. It has no vested right to any of its powers or franchises. Its charter or act of right to incorporation is in no sense a contract with the state. It is subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, and may change [92] or modify its internal arrangement, or destroy its very existence at discretion. While it exists in subjection to

the will of the state, whose will can only be expressed by the legislature, it enjoys the rights and is subject to the liabilities of any other corporation, public or private. It is because it is a body politic, and has a legal entity and name and a seal by which it can act, that in addition to these the legislature endowed it with the capacity to contract and be contracted with, to sue and be sued, to hold and dispose of property. It is because it has this capacity and these powers that it can acquire rights and incur responsibilities. These franchises were bestowed by the legislature upon it, that it might exercise certain powers of government, not independently of or in defiance of the legislature over that particular part of the state known territorially as the city of Wilmington.

These are its rights affecting its relations to other persons. They do not affect its relation to the state, because in certain particulars as a private corporation it may make contracts which it cannot impair. Its absolute dependence upon the will of the legislature for its existence is not thereby diminished or destroyed. Its responsibility in respect to its contracts or torts does not affect its relationship to the state. In our opinion the state may continue its corporate existence, and yet appoint all or any of the agencies through which it has heretofore been accustomed to act.

The city of Wilmington has no vested rights as against the state nor rights not subordinate to the authority of the state. In this respect it is precisely on the same footing and sustains the same relation to the state as all other municipal corporations within the state. It has no dual character, as a corporation it is either public or private. It is bound to fulfill its legal contracts and to answer before the legal tribunals for its torts in the same manner and to the same extent as a private corporation or a private individual. The courts for the administration of justice are equally open to corporations of this character as to those of a private nature, or to private individuals. Its rights to property legally held, including the control and government thereof, in respect to all parties other than the state, are the same as if it were a real and not an ideal being.

In the case of *Borough of Dunmore's Appeal*, 52 Pa. St. 374, the court say: "Municipal corporations being creatures of the legislative power are subject to the legislative will in a manner and to an extent to which citizens are not. The constitutional guarantees of the citizen were respected in giving

him a right of appeal; the municipal corporations having no such guarantees the right of appeal was not given to them."

The counsel for the plaintiff in error referred us to the case of *New Orleans etc. R. R. Co.* v. *New Orleans*, 26 La. Ann. 481.

The first principle in his brief seems to be a transcript of a portion of the opinion of the court in that case.

The court, among other things, said: "A municipal corporation is appropriately defined to be 'the investing the people of a place with the local government thereof': Salk. 188. It has no powers not conferred upon it expressly or by fair implication by the law of the state creating it or statutes applicable to it. Both the persons and the place inhabited by them are indispensable to the constitution of such a corporation. It is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated, and not common to the state or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two classes of powers and two classes of rights—public and private. In all that relates to one class it is merely the agent of the state, and subject to its control; in the other it is the agent of the inhabitants of the place—the incorporators—maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator.

"Among this latter class is the right to acquire, hold, and dispose of property, to sue and be sued, etc.

"It is true that these rights are originally derived from the legislature, but once conferred they are to be exercised while it exists, at the will of the corporation, in its own, and as to its own interests, for the inhabitants, just as certain rights are conferred on private corporations and persons not *sui juris*, as minors and married women, but are not afterwards under the control of the legislature."

In our opinion this case was properly decided, but we dissent [94] from much that was said by the judge in his opinion as interpreted by the counsel for the plaintiff in error. Much of what he said was not necessary. It was not necessary in that case that he should have said that a municipal corporation possesses two classes of powers and two classes of rights, public and private, and that the latter is the right to acquire, hold, and dispose of property, to sue and be sued, etc., and these remarks were not, in our opinion, in fact true.

The legislature may, and generally does, confer these rights upon all public corporations. The right to acquire, hold, and dispose of property by a corporation does not make that property, in any just sense of the word, private property, and the right and capacity to sue and be sued pertains no more to a private than to a public corporation.

The inhabitants of the city of Wilmington were constituted a corporation, under the name and style of the mayor and council of the city of Wilmington, and were given a seal by the legislature that they might acquire, hold, and dispose of property, sue and be sued. But for what purpose or purposes? For public and not private purposes. The corporation is a public corporation. The uses for which the corporation may acquire and hold property must necessarily, we think, be public uses. Uses, beneficial it may be in some respects to the public at large, but certainly beneficial to the citizens generally of the municipality, who may be called a particular local public, although a part of the general public of the state. Such property cannot in any sense be said to be private in the sense in which property may be said to be private which is held by an individual citizen.

No citizen of Wilmington possesses any interest in the property of the municipality, which is said to be private, which he can sell or in any manner dispose of. No portion of property held by the city passes to the local representatives of any inhabitant of the city, or descends to his heirs upon his death; partition cannot be made of the real estate among the inhabitants in any manner known to law. Such property has not the incidents or qualities of private property attaching to property recognized as private among individual owners of property.

When a citizen of Wilmington removes from the city he [95] ceases to have any interest in the use of the property as one of the corporators.

When a person from the most distant part of the country moves into the city and becomes an inhabitant thereof he immediately becomes a corporator and entitled, as all other inhabitants, to an interest in the use of the property.

In the case cited from the Louisiana reports the property in respect to which that case arose was public and not private property, that is to say, it was property held and owned by the city for the use of its inhabitants. The legislature had attempted to grant to a private corporation the right to con-

struct a railroad upon or across this property, not under proceedings in condemnation, but absolutely and in deprivation of the right of the city in its property without providing that the private corporation should make compensation for the taking of it. Of course this could not legally be done; in one sense the property was private property, that is, property owned by the corporation for the public use of the inhabitants of the city.

The inhabitants of a city, who are in fact the corporators under a charter creating a municipality are a portion of that general public which constitute a state. And they are also that particular public which constitute a municipality.

The municipality may hold property in which all the inhabitants of a state or of a county may be said to have an interest in some respect, but not as owners or proprietors. And it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public. The one as to the people of the whole state or county, the other more particularly as to the inhabitants of the municipality.

It is only in this sense that the words "public" and "private" can with propriety be applied to such property when held by a municipality.

Although the property held for the municipality is in fact public as common to all the inhabitants of a city, it nevertheless may justly be said to be private property as being such property as is exempt from being taken or applied to any other public use by the state, or by authority of the state, without compensation being made.

It was said in the course of the argument of the present case that the corporation of Wilmington owned a lot within the limits of the city, called the "sand lot." Now, if the legislature of this state had passed an act authorizing the Baltimore and Ohio Railroad Company to take any portion of this lot for the purpose of constructing their road, now in the course of construction through that city, without compensation, there could be no doubt that such an act would be unconstitutional as against the spirit of the constitution, which declares that private property shall not be taken for public use without compensation being made. The lot would be considered private as belonging exclusively to the corporation, although the use for which it is held by the corporation is public, for the benefit of all the inhabitants of the city. And

the title in fact is in all the corporators, that is the inhabitants of the city. Had the Baltimore and Ohio Railroad Company in fact attempted to construct their road across this lot there can be no doubt that the city would have been entitled to an injunction restraining them from so doing.

While the municipality of Wilmington exists as a corporation, endowed with the capacity of purchasing and holding property, it has a right as against every other corporation or person to the use and enjoyment of its property as freely and fully as a private person can hold and enjoy similar property, but city corporations are emanations of the supreme law-making power of the state, and they are established for the more convenient government of the people within their limits.

In cities, for reasons partly technical and partly founded upon motives of convenience, the title of certain property is vested in the corporate body. It is not thereby shielded from the control to a certain extent of the legislature as the supreme law-making power of the state. While the corporation exists by authority of the state authorized to purchase and hold property for the inhabitants of the city to be paid for by the taxes levied upon the inhabitants, it would not, in our opinion, be competent for the state to take away such property and give it to other corporations or persons.

In case of the condemnation for public purposes, as for instance, [97] to enable the Baltimore and Ohio Railroad Company to construct a road across the lot referred to, it would not, we suppose, be competent for the legislature to direct that the condemnation money should be given to the corporation of the city of New Castle or should be applied to any municipal purpose of that city. But suppose the sand lot owned by the city of Wilmington should become worthless to the city or not adapted to any municipal use and valuable only for sale to private persons for building purposes. Could it be doubted that the legislature might direct it to be sold and the proceeds be devoted to some municipal or public purpose within the city of Wilmington?

The right to acquire the property by means of taxation was conferred upon the city that the property so acquired might be useful to the city, and we can imagine no limit to the control of the state over property so acquired consistent with the preservation of the property or of its proceeds for the uses and purposes for which it was acquired and the benefit of those for whom it was acquired.

The constituting a board of commissioners for the management of the property of a municipal corporation for the benefit of the corporators is no diversion of the property from the purposes of its acquisition. No title is thereby divested, and no property is wrongfully taken. In the case of the water-works of the city of Wilmington, these works were not taken away from the city by the appointment of a board of commissioners to manage them; nor was their use diverted from its original purpose. Whether managed by the city council or by the board of commissioners appointed by the authority of the legislature, the uses and purposes of the water-works—the supply of water to the corporators or inhabitants of the city—will be the same, and while these purposes and objects continue the same we can see no violation by the act of the legislature of any equitable right of which the city may complain.

We have considered this question as though the city was in fact a party to this proceeding and complaining of a violation of its chartered rights; such, however, does not appear to be the case from the record before us.

David H. Coyle appears from that record to be the only party defendant below, and plaintiff in error here. He claims to hold [illegible] the appointment of chief engineer of the water department of the city of Wilmington by appointment of the city council, and he makes the objections that the act of the legislature establishing the board of water commissioners is unconstitutional, and that therefore the relator in this case has no authority to exercise the functions of chief engineer by appointment under the authority of said act.

We do not place our decision, however, in this case, upon the ground that the city of Wilmington or the mayor and council of the city of Wilmington are not technically parties to these proceedings, but upon the broad ground of the right of the relation under this or any other proceedings that can be had or taken to determine his right as between him and the plaintiff in error, or between him and the mayor and council, or any party or parties whomsoever.

We do not suppose that, if the powers conferred upon the board of water commissioners by the act of the legislature creating it had by that act been conferred on the council of Wilmington, any serious objection could or would have been made to the constitutionality of the act. If not, the controversy would be narrowed down to very small dimensions

indeed. Has the city council of Wilmington any vested or constitutional rights as against the state to manage or control the water-works of the city of Wilmington, or to appoint agents or managers to control them? They are the mere creatures of the legislature, which can in a moment destroy, as in a moment it created, them. The legislature can divest the council of any and every power and authority it possesses. It can direct that those powers should be exercised by any other department or agency of the city government, and it could even direct that the functions now performed by the city council should hereafter be performed by a like number of any other corporators of the city.

All the agencies of the city, that is of the corporators, can be abolished or changed at the will of the legislature, and even their functions terminated and assigned to other and different agencies. The legislature can change the name and style of the corporation and even of the city itself without the consent and even against the will of the inhabitants. It may circumscribe or extend the limits of the corporation. It may divide the city into two, four, or more cities, and give to each a separate and independent organization, [99] and burden the separate cities with such share in the payment of the existing debt of the city as shall be determined by a board of commissioners appointed by the legislature for that purpose. It may declare that the amount so determined by such board shall be final upon the respective newly created cities. In the *Borough of Dunmore's Appeal*, 52 Pa. St. 374, before referred to, a township being in debt four boroughs were created out of it. An act was afterwards passed authorizing commissioners to ascertain the indebtedness of the township and the amount due from the boroughs respectively, and make a just distribution of the indebtedness between the township and boroughs, and requiring all persons having claims to present them. An appeal was authorized from the decision of the commissioners on such claims. The court said, as hereinbefore recited: "This legislation is unprecedented and perhaps severe, but it denies trial by jury only to municipal corporators, who being creatures of the legislative power are subject to the legislative will in a manner and to an extent to which the citizens are not. The constitutional guarantees of the citizens were respected in giving him a right of appeal. The municipal corporators having no such guarantees the

right of appeal was not given to them. The theory of the act was therefore unexceptionable."

May the city of Wilmington forever remain undivided and by the obedience of its inhabitants to law prove that it should be indivisible.

We have no doubt that should occasion arise for the exercise of the power the legislature of the state would have the right to declare that the city of Wilmington should have and maintain not only suitable water-works for the supply of the city with good and wholesome water, but should have and maintain a proper fire department and proper gas-works for the protection of the city from fire, and for the proper lighting of the city, for the convenience, safety, and comfort of the inhabitants. They might authorize the levying of taxes upon the inhabitants of the city for the defraying of the expenses necessary for the accomplishment of these purposes, and they might appoint commissioners to do whatever was necessary to be done to effectuate the act.

What the legislature might do in respect to Wilmington, they 100 might do in respect to any and all municipal corporations in the state where, in their judgment, a like necessity might exist.

The police power of a state is great, and may do whatever is necessary to promote the safety and health of the inhabitants of a municipality.

We do not consider it necessary to express an opinion in reference to any question not properly put before us, such as the issuing of bonds and the pledging of the faith of the corporation or the state to their redemption in any manner. If such bonds have been issued or shall be issued on the faith of the one or the other, or any such pledge has been or shall be made by the one or the other, it will be time enough to consider that question and the rights of the parties that may be affected thereby when it shall be presented for our consideration by parties capable of making it, and having an interest in its determination. No such parties are before us. It would not become us to express any opinion as to the wisdom or propriety of the enactment, the constitutionality of which has been the subject of contention before us.

We deem it not improper, however, to say that in our opinion the affairs of a municipal corporation should generally be administered in accordance with the will of its inhabitants, who, it is reasonable to suppose, are better acquainted with

what will conduce to their comfort, happiness, and prosperity than others possibly can be.

Whether this act should have been passed by the legislature was a question to be determined solely by the legislature itself. We can determine only as to the constitutionality of what the legislature has done, and, in our opinion, the city of Wilmington, being a municipal corporation, all its powers under its charter are subordinate to the powers of the legislature.

The legislature having the power to repeal its existence, necessarily has the power to alter, amend, or abolish any of the agencies through which the powers of the corporation are exercised, or to change them or to substitute others in their place.

That although the water-works of the city may have been, prior to the passage of the act to establish a board of water commissioners, under the control and management of the city council in any manner whatever, and may have been exercised through any [101] agencies whatever, it was competent for the legislature to alter and change that control, management, and agency as they might deem proper. Such alteration of control, management, and agency, provided the same was not a diversion of the object and purposes for which the water-works were established, would effect no vested right of the city or the corporation as against the state.

The rights of the corporators to the property being secured to them, and the property of the corporators being preserved for its original purposes, if such be the case, and we see nothing in the act establishing a board of water commissioners to the contrary, this court is not at liberty to declare the act itself unconstitutional.

The judgment below is therefore affirmed.

MUNICIPAL CORPORATIONS DEFINED.—A corporation created for municipal purposes is one established by law for governmental objects, subject to the control of the legislature, with certain delegated political powers to be exercised for the public good in the administration of good government, and whose members are its citizens: *Cook* v. *Portland*, 20 Or. 580; *Tinsman* v. *Belvidere etc. R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565, and note; *Regents etc.* v. *Williams*, 9 Gill & J. 365; 31 Am. Dec. 72. A local corporation created to serve municipal purposes, but which is not the direct representative of the people of its locality is not a municipal corporation: *O'Leary* v. *Board of Commrs.*, 79 Mich. 281; 19 Am. St. Rep. 169. See, also, the note to *Ten Eyck* v. *Delaware etc. Canal Co.*, 37 Am. Dec. 238.

MUNICIPAL CORPORATIONS—POWER OF LEGISLATURE OVER.—Cities are public corporations subject to legislative control: *Mayor etc.* v. *State*, 15

Md. 376; 74 Am. Dec. 572; *Mayor etc.* v. *Groshon*, 30 Md. 436; 96 Am. Dec. 591. In the absence of express constitutional limitation the legislative power over municipal corporations is unlimited: *Winters* v. *George*, 21 Or. 251; *Martin* v. *Dix*, 52 Miss. 53; 24 Am. Rep. 661. See the extended notes to *Hasbrouck* v. *Milwaukee*, 80 Am. Dec. 731, and *Mount Hope Cemetery* v. *Boston*, 35 Am. St. Rep. 531, where this question is fully discussed; and also the note to *Bailey* v. *Mayor*, 38 Am. Dec. 677.

MUNICIPAL CORPORATIONS—FRANCHISES, WHETHER VESTED RIGHTS.—The rights and franchises of municipal corporations can never become vested rights as against the state: *Montpelier* v. *East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748, and note. The powers of municipal corporations are subject to legislative control, and their charters may be altered or repealed at the pleasure of the legislature: *Tinsman* v. *Belvidere etc. R. R. Co.*, 26 N. J. L. 148; 69 Am. Dec. 565, and note. See the extended note to *Commonwealth* v. *Cullen*, 53 Am. Dec. 472.

MUNICIPAL CORPORATIONS—POWER OF LEGISLATURE OVER PROPERTY OF.—The property owned by a municipal corporation is public property, and subject to the control of the legislature: *Darlington* v. *Mayor*, 31 N. Y. 164; 88 Am. Dec. 248; *State* v. *Brown*, 53 N. J. L. 162; *Penny* v. *Croul*, 76 Mich. 471. For a thorough discussion of this question see the monographic note to *Mount Hope Cemetery* v. *Boston*, 35 Am. St. Rep. 529.

SWIFT *v.* RICHARDSON.

[7 HOUSTON, 333.]

CORPORATIONS.—A STOCKHOLDER'S RIGHT TO MAKE ABSTRACTS AND MEMORANDA OF DOCUMENTS, BOOKS, AND PAPERS is as full and complete as is his right to an inspection thereof.

A MANDAMUS IS a command issued from a court directed to some person, corporation, or inferior court within the jurisdiction of the superior court requiring such person, corporation, or inferior court to do some particular thing therein specified.

THE WRIT OF MANDAMUS IS IN DELAWARE DIVESTED OF ALL ITS PREROGATIVE FEATURES, and issues whenever necessary for the enforcement of a remedy by a person having a legal right against another withholding that right.

THE WRIT OF MANDAMUS issues only when there is a clear and specific right to be enforced or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy.

CORPORATIONS, MANDAMUS AGAINST.—A STOCKHOLDER in a corporation may have a writ of *mandamus* to compel the custodian of corporate documents to allow him an inspection and copies of them at proper times and on proper occasions.

A MANDAMUS AGAINST A CORPORATION TO ENFORCE THE RIGHT OF A STOCKHOLDER to inspect and take copies of corporate documents should be directed to the person or officer having the custody thereof, though he is merely a ministerial officer acting by the direction of other officers, and the corporation itself need not be made a party to the proceedings by which the writ is sought.

MANDAMUS MAY ISSUE IN THIS STATE TO ENFORCE THE RIGHT OF A NON-RESIDENT STOCKHOLDER to inspect and take copies of documents of a foreign corporation, if they are in this state and in the custody of the person to whom the writ is directed.

George Gray and Benjamin Nields, for the plaintiff in error.

William C. Spruance and William M. Lillibridge, for the defendant in error.

240 SAULSBURY, C. The case comes before us upon a writ of error to a judgment of the superior court of this state in and for New Castle county, in favor of David M. Richardson against William H. Swift, president of the Diamond Match Company. Richardson was the holder and owner of shares of stock in the Diamond Match Company, a corporation under the laws of Connecticut. Swift was a director and president of said company, and resides in this state.

As a stockholder in said company, Richardson applied to Swift for permission to inspect and take copies of certain papers and documents in his possession, for a purpose which he alleged was necessary and proper, and material to his interest as a stockholder in said company. Inspection was not refused, but permission to make copies or memoranda of said papers and documents was refused. Thereupon Richardson presented his petition to the court below, praying said court to award a writ of *mandamus* against Swift, commanding him to suffer and permit said Richardson to inspect and make copies of the instruments, books, papers, and writings in his custody or control belonging to the said Diamond Match Company, to wit:

1. All contracts and agreements for the purchase, by or on 241 behalf of the said Diamond Match Company, of match factories, and other property relating to the same, prior to January 1, 1881.

2. All instruments in writing conveying or assigning to said company, or other persons in its behalf, property, rights, or franchises relating to the manufacture of matches prior to said last-mentioned day.

3. All contracts, agreements, or conveyances relating to said purchase of property by or on behalf of said company, other than for materials or supplies in the usual course of its business prior to said last-mentioned day.

4. All bonds, contracts, and agreements, not to engage in the match business, made to or with said company prior to said last-mentioned day.

5. All books, papers, and writings of said company, showing the net earnings of the company for and during the years 1881 and 1882.

To Richardson's petition Swift filed an answer, in which he does not deny that the papers and documents mentioned in Richardson's petition, and sworn to be in his possession, were in his possession at the time of the service of the writ, or were then in his possession, but states:

"That the law of the said state of Connecticut, under which said corporation was created and exists, provides that: 'The statements and books of every such corporation shall be kept in the town where it is located, and shall, at all reasonable times be open to the inspection of its stockholders; and as often as once in each year a true statement of the accounts shall be made and exhibited to the stockholders.' And the said law further provides 'That the president and treasurer of every joint-stock corporation shall annually, on or before the fifteenth day of February or August, lodge with the town clerk of the town in which said corporation is located, a certificate, signed and sworn to by him, showing the condition of its affairs, as nearly as the same can be ascertained, on the first day of December or January, or on the first day of June or July, next preceding the time of making such certificate, in the following particulars, to wit: 1. The amount of the capital stock actually paid in; 2. The cash value of its real estate; 3. The cash value of its personal estate, exclusive of patents; 4. The amount of[242] its debts; 5. The amount of its credits; 6. The name, residence, and number of shares of each stockholder.'"

The defendant, Swift, also in his answer says: "That, in conformity to the provisions of the said law, as aforesaid, the statement and books of the said corporation have been, and are now, kept in the town of New Haven, where it is located as aforesaid, and have been at all times, and are now, open to the inspection of any of the stockholders; and that, in the month of February in each year since the organization of said corporation, the certificates required by said law, as aforesaid, signed and sworn to by the president and treasurer of said corporation, have been duly lodged with the town clerk of said town of New Haven, and duplicates thereof, made and sworn to as required by said law, have been lodged by them, as aforesaid, with the secretary of the said state of Connecticut; and that in all respects the requirements of the said

law, as set forth in the relator's exhibit B, have been fully and faithfully complied with by the said corporation and its officers, and that the said statements and books were not, at the time of the filing of said petition, or at any time since, in the custody or possession of the said William H. Swift."

Now, it will be observed that the relator's exhibit B, in respect to which Swift in his answer says that the requirements of the law have been fully and faithfully complied with by the said corporation and its officers, relates only to: 1. The amount of the capital stock actually paid in; 2. The cash value of its real estate; 3. The cash value of its personal property, exclusive of patents; 4. The amount of its debts; 5. The amount of its credits; 6. The name, residence, and number of shares of such stockholders. And it was in reference to these that Swift says that "the said statements and books were not, at the time of the filing of the said petition, or at any time since, in the custody or possession of the said William H. Swift."

He nowhere makes a similar declaration in respect to the documents and papers, an inspection of which, and the privilege of making copies of which, was demanded of him by the relator, and the privilege of taking copies of which was refused by him. This will appear manifest from the answer of Swift to the petition filed in the court below. He therein says that "this respondent is without [348] authority from said corporation to permit, and is expressly prohibited by said corporation from permitting, the said relator to make copies of its books, papers, or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the state of Connecticut, under which the said corporation exists."

He further says that "to allow copies of all the instruments, bonds, contracts, agreements, books, papers, or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder, and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

From this, also, it appears that the papers and documents mentioned in the relator's petition as in the possession of the said Swift, and the privilege of taking copies of which was

demanded by him, and refused by the said Swift at the city of Wilmington, where they were in said Swift's possession, were not the same as those required to be kept in New Haven by the act of the state of Connecticut under which the Diamond Match Company was organized, and were not the same statements and books as those mentioned in the relator's exhibit B, which Swift, in his answer, says were not, at the time of the filing of the said petition, or at any time since, in the custody or possession of the said William H. Swift.

When Swift says that "the said relator has been furnished with statements showing fully and accurately what were the net earnings of the said corporation during the years 1881 and 1882, and has been permitted by the said corporation full and free access to all books, accounts, bonds, and papers mentioned in his petition, and to inspect the same personally or by his attorney," he nowhere denies that demand was made upon him by the relator for permission to make copies of the books, accounts, bonds, and papers, and that such demand was refused by him.

The right to make copies, and to make abstracts and memoranda, of documents, books, and papers, by a stockholder in an incorporated company, is as full and complete as the right of inspection [244] thereof. David M. Richardson, the relator, a resident of the state of Michigan, was and is a stockholder of the Diamond Match Company, a corporation created under the laws of the state of Connecticut. William H. Swift, a resident of the city of Wilmington, in the state of Delaware, was and is a stockholder in the said corporation, and president thereof.

There was and is no law of the state of Connecticut requiring that the president of said corporation should be a resident of the state of Connecticut. There was and is no law of said state requiring that the papers and documents mentioned in the relator's petition should be kept in New Haven, or in the state of Connecticut. They were, in fact, kept in the city of Wilmington, in the state of Delaware, and in the possession of William H. Swift, at the time of the demand and refusal of the privilege of copying the same, and are there yet in the same possession, so far as we know from any thing in this case.

The grounds upon which the awarding of the *mandamus* was resisted in the court below, and upon which the reversal

of the judgment below is asked in this court, are sufficiently stated in the answer of Swift, and are as follows:

"And the said William H. Swift further says that the said David M. Richardson and the said Christian H. Buhl and Russell A. Alger are all residents of the state of Michigan, and the controversy and suit pending between them, as appears from the said relator's petition and exhibits filed, arises upon a contract entered into between them in the said state of Michigan, and which was made with respect to the laws of the said state; and the said controversy and suit do not arise upon any contract or engagement entered into in the state of Delaware, or with respect to the laws thereof; that the said controversy or suit is not with or against the said corporation, or for the purpose of establishing or maintaining any right of the said relator as a member of the said corporation, or compelling the exercise or performance, by any officer thereof, of any corporate function or duty; and that the suit or controversy does not arise out of, or upon, any contract or engagement by or on behalf of said corporation, or out of or by reason of any duty imposed by the law upon said corporation, and that the said corporation is not a party to said suit, or interested therein, and can in nowise [345] be affected by its determination; that this respondent is without authority from said corporation for permitting said relator to make copies of any of its books, papers, or instruments of writing, which may be in his custody or control as president of said corporation, for the purposes mentioned in said petition, unless required so to do by the laws of the state of Connecticut, under which the said corporation exists; that to allow copies of all the instruments, bonds, contracts, agreements, books, papers, or writings belonging to the said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder, and obstruct the conduct of the business of the said corporation, and injure and greatly damage the interests of the same, and of its other stockholders."

A *mandamus* may be defined to be a command issuing from the superior court, directed to some person, corporation or inferior court, within the jurisdiction of the superior court, requiring them to do some particular thing therein specified which by law they are bound to do, and which a superior court has previously determined or at least supposes to be consonant to right and justice.

It is unnecessary for the purposes of this case to trace the origin and history of the writ of *mandamus*. While it is true that in England it was originally what is called a "prerogative writ," and is there generally treated as such, in this state, and in this country, it is simply a writ, divested of all its prerogative features, for the enforcement of a remedy by a person having a legal right against another person withholding that right.

Prerogative writs, as such, may be said to have no existence in this state, or in this country. The writ of *mandamus*, and the right to it in all cases to which it is applicable, is as clearly recognized in our jurisprudence as any other writ which may be issued out of the courts of law to which a party may be entitled. A clear recognition of this as settled law will go far to divest the character of the writ of much seeming mystery or obscurity of meaning with which it has been customary to surround it, and will greatly simplify the issue involved in this cause, which is nothing more nor less in its nature or character than a suit at law between one person as plaintiff and another as defendant.

Thus considered, the only questions for us to decide in this [346] case are: Has David M. Richardson, the plaintiff, shown a clear right against William H. Swift to be permitted by him to inspect and take copies of the papers in the petition mentioned? Has he made demand, and been refused the privilege of so doing by said Swift? Has he any other remedy, or is the writ of *mandamus* his only specific remedy for the enforcement of a clear right which has been denied him? Has he no other adequate or specific legal remedy to compel the inspection, and the right to take copies of the papers and documents mentioned in his petition? Has the relator shown a clear legal right to the particular thing which he has demanded? Has the right been refused by William H. Swift? Did Swift act wrongfully and illegally in refusing the relators' right? And is there no other way in which the relator can legally enforce his right except by the writ of *mandamus*? These are the questions, and the only questions, which are necessary to be decided by us.

The writ of *mandamus* only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to to protect must, therefore, be clearly established; and the

writ is never granted in doubtful cases. The exercise of the jurisdiction to grant it rests, to a considerable extent, in the sound discretion of the court, subject always to the well-settled principles which have been established by the courts.

The test to be applied in determining the right to relief by *mandamus* is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, and find themselves without an appropriate legal remedy. "In such case," says High, "the right to the extraordinary aid of a *mandamus* may be regarded, to that extent, as *ex debito justitiæ*." The relator must show, not only that he has a clear legal right to have the particular thing in question done, but also the right to have it done by the person against whom the writ is sought.

A corporator may have a *mandamus* to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at proper times and on proper occasions; he showing clearly [847] a right on his part to such inspection and copies, and refusal on the part of the *custos* to allow it: Angell and Ames on Corporations, 775, and notes of authorities cited; High on Extraordinary Legal Remedies.

Indeed, upon this point the authorities are uniform, and I shall not burden this opinion with the citation and examination of the numerous authorities which have established it as settled law.

Swift never in his answer objects that the corporation, the Diamond Match Company, is not a party to the proceeding. He nowhere denies that he is the *custos* of the papers, documents, etc., an inspection and copies of which have been demanded of him and been refused by him. If he was such *custos*, it was not necessary, in my opinion, that the corporation should have been a party to the proceedings. Had the corporation been created by the laws of this state it would not have been a necessary party to these proceedings. "Indeed," says Angell and Ames on Corporations, 775, "it (*mandamus*) lies to any person who happens to have the books of the corporation in his possession, and refuses to deliver them up."

And High on Extraordinary Legal Remedies, section 31, says, which is more pertinent to the point under consideration:

"As regards the person to whom the writ should be directed, when an inspection of corporate records is sought, the proper practice is to address it to the one actually having the custody of the books and records, even though he is merely a ministerial officer acting under the direction of others, as in the case of a bank cashier acting under a board of directors. In such case the rule applies that the writ should run to the particular person who is to perform the act required, and the cashier having charge of the books, his refusal to allow their inspection is his individual act, and the writ is therefore properly addressed to him, but there is no impropriety in such case in directing the writ also to the board of directors."

If the writ should be addressed to the one actually having the books and records, even though he is merely a ministerial officer acting under the direction of others, as a cashier of a bank acting under the board of directors (*People* v. *Throop*, 12 Wend. 183), it would seem that the corporation was not only not a necessary party, but should not be a party according to such practice, although the [sic] addition of the corporation, or including it in the rule, would not vitiate the proceedings; and the reason is this: That, while the *custos* would be the party to whom the writ should be addressed, he having the books, papers, etc., in his possession, there would be no impropriety in allowing the corporation, whose agent the *custos* was, to answer the rule, and show cause, if it could, why its agent should not be compelled by the writ of *mandamus* to allow the inspection and copies of the same.

Taking this, therefore, to be the proper practice in cases where the *custos* is in possession of the documents and papers, an inspection and copies of which are demanded, and in cases where the corporation is a domestic one, can there be any reason why the rule should be different where the corporation is a foreign one; the *custos* being domiciled in this state, and having possession of the books, papers, and documents by authority of the foreign corporation? I can see none. Swift in his answer says that "the said Diamond Match Company is a corporation created by and existing under the laws of the state of Connecticut, and is not a corporation created by or existing under any law of the state of Delaware; and that the same is located in the town of New Haven, in the state of Connecticut, though it does hold real and personal property in the state of Delaware, and transacts

business incidental to its business within the state of Connecticut."

Now, if it holds real and personal property in the state of Delaware, and transacts business incidental to its business within the state of Connecticut, it holds such property and transacts such business by the comity of the state. Its president lives here, and is the *custos* in fact of the documents and papers, an inspection of which, and the privilege of taking copies of which, the relator seeks. The corporation itself does business here, not as a corporation created by the state of Delaware, but as a foreign corporation created by the law of Connecticut.

What results from this? That acting here as a foreign corporation, and holding real and personal property, and doing business as such within this state, it submits or subjects itself to the law of the state, in the same manner and to the same extent, in respect to such property and business, as it would be bound to do were it a corporation created by the state of Delaware; and it owes [249] obedience and subjection to the mandates of its courts in these respects as fully as if it were a domestic corporation.

Was William H. Swift the legal *custos* as well as the *custos* in fact of the documents and papers, an inspection and copies of which the relator seeks? No act of the legislature of Connecticut, and no by-law or rule of the corporation, has been produced showing that provision was therein made for the custody of said books and papers. Nothing has been shown us which requires said documents and papers to be kept within the state of Connecticut. They have not been shown to have been in the possession of any other person than William H. Swift. William H. Swift has for many years resided, and still resides, in the city of Wilmington, in the state of Delaware. He has, and ever has had, the actual possession and control of the same, as far as their history has been made known to us. His possession of them is not to be presumed unlawful, but is, I think, presumed to be lawful. Service of the rule was made upon him, and an answer to it was made by him. He signs himself to said answer as William H. Swift, president of the Diamond Match Company.

Now, suppose Mr. Richardson, the relator, instead of being a citizen and an inhabitant of the state of Michigan, was a citizen and inhabitant of the state of Delaware, and a stockholder in the Diamond Match Company; could any one reasonably

doubt that the courts of Delaware would be competent to afford him the relief he asks by granting him the state's writ of *mandamus?* Does the fact that he is a citizen and inhabitant of the state of Michigan affect his rights in this respect? I think not. Has he not the same rights, as a stockholder in the company to the inspection and copies of the books, papers, and documents in the possession of Swift, who must be presumed to be the agent of the directors of the company in respect to such books, papers, and documents, and the custody thereof, and who is in fact the president of the company as he would have were he a citizen and an inhabitant of the state of Delaware? Has he not the same rights in respect thereto, in the courts of Delaware, as the citizen and inhabitant of Delaware would have?

Section 2, article 4, of the constitution, provides that "the citizens of each state shall be entitled to all privileges and immunities [sic] of citizens in the several states." Among the rights secured is the right to sue in the courts of any state. This is settled by judicial decisions beyond legal controversy.

It does not matter, for the purpose of this case, where the said David M. Richardson and Christian H. Buhl and Russell A. Alger reside, nor how the controversy and suit pending between them arises. The question is: Has the relator shown a clear right to inspect and take copies of the books, papers, and documents mentioned in his petition? It is not material who are the parties to the suit in Michigan mentioned in the respondent's answer, nor out of what it arises. The question is: What are the rights of Richardson, the relator, as against Swift, the respondent, in respect to the papers and documents of which Swift is the legal *custos?* It is not in the power of the corporation to prohibit its president and agent from obeying the mandate of the court below. Courts of law are not prohibited from exercising their rightful jurisdiction by such feeble authority, nor will they heed such impotent obstructions. If they have jurisdiction, in all proper cases they will proceed to judgment, and execute their judgments in the manner the law provides.

But the respondent says that "to allow copies of all the instruments, bonds, contracts, agreements, books, papers, or writings belonging to said corporation, and mentioned in said relator's petition, to be made by the relator for use and publication in his said suit, would greatly impede, hinder, and obstruct the conduct of the business of the said corporation,

and injure and greatly damage the interests of the same, and of its other stockholders."

Why awarding the writ of *mandamus* in this particular case should be attended by such consequences to the corporation is not readily to be perceived. If its transactions have been fair and just in all respects to the members of the corporation and others, it is presumed that such transactions will bear the light of inspection and criticism without impeding, hindering, or obstructing the conduct of the business of the corporation, or injuring it in any respect whatever; but the right of Richardson to the relief he seeks depends, not upon the consequences that may result to the corporation, but upon his showing, to the satisfaction of the court, [351] that he is entitled to the inspection and copies of the papers mentioned in his petition.

It does not follow that although the court below had the right, and it was its duty, to award the writ of *mandamus* against Swift under the circumstances of this case, the power of the superior court in respect to a foreign corporation is unlimited, and may be exercised in respect to all matters in which foreign corporations are concerned. The superior court, and even the state of Delaware itself, cannot forfeit the charter of a foreign corporation. It cannot compel the election of a stockholder, nor prevent the removal of one. It cannot, in general, intermeddle with or control the internal concerns of a foreign corporation. Its jurisdiction in respect to such corporations is extremely limited; but it has power to see that the officers, agents, and servants of such corporations, transacting business in this state, by the comity of the state, shall yield obedience to the laws of the state.

I have not made reference to the fact that there is an act of the assembly of this state, conferring the right on the Diamond Match Company, a corporation of the state of Connecticut, to hold real and personal property, and to transact its business, within this state; for, although the act is mentioned in the brief of the respondent's attorneys, and referred to in the argument, it is nowhere stated in the record sent up to us from the court below. The ownership of the property and the transaction of the business of a foreign corporation, is admitted by the respondent in his answer. The obligations arising from state comity are the same as those that would arise from such an act of the general assembly, and would be so regarded by the courts of law.

For the reasons which I have stated, I think that the judgment of the court below should be affirmed, with costs.

HOUSTON, J., concurred.

FROM the opinion of the court Justice Grubb dissented. In his dissenting opinion he emphasized the fact that the circumstances of the case were novel, that the applicant for the writ of *mandamus* was a citizen of Michigan and a stockholder in the Diamond Match Company, incorporated exclusively under the laws of Connecticut, but holding property and transacting part of its business in Delaware. He said it was a well-settled principle of law that "a corporation can do no acts either within or without the state which creates it, except such as are expressly authorized by the law creating and empowering it, or derived from a true construction thereof; and the acts must be done in the manner and by the officers or agents indicated in such law": Citing *Bank of Augusta* v. *Earle*, 13 Pet. 587; *Railroad* v. *Koontz*, 104 U. S. 11. The record, he said, did not disclose that Swift, the president of the corporation, was authorized by the laws of Connecticut to do the acts which it was sought to compel him to do, or to have the books or papers of the corporation outside of the state of Connecticut for the purpose of allowing a stockholder to inspect or to take copies of them in Delaware or elsewhere; and in the light of the considerations and the facts stated upon the record, the probabilities were against, rather than in favor of, the applicant's right to have such inspection outside of the state of Connecticut, and therefore, as the right was doubtful, *mandamus* could not issue for its enforcement. He further maintained that the superior court had not jurisdiction by *mandamus* over a foreign corporation or its officers or agents to enforce the performance of any corporate duty not imposed by the laws of the state of Delaware. The effect of the uniform current of adjudications in Delaware, he said, was that "until it shall be modified, as in England, by legislative authority, *mandamus* is a prerogative writ in the supervisoral sense—a writ of sovereignty, not of royalty," and that it issues by a superior court, not of course, but only in the exercise of a sound judicial discretion, and can be employed only against inferior judicial tribunals, corporations, and persons bound to the proper discharge of authority with which they have been clothed by law for the public benefit, and not against persons standing in a private relation, and that it could be issued against private corporations" only in the name and by the authority of the state which created the corporation, and to which state is exclusively due its obligation to so exercise its powers and functions as to promote primarily the public good of the people of that state; that this principle is equally applicable whether the stockholder is a resident or a nonresident of the state of the domicile of the corporation; that the writ, in the absence of statutory authority, could not be authorized or issued as against a foreign corporation, and that as no corporate duty existed in this state in favor of a foreign corporation, a stockholder could not by *mandamus* in this state compel the performance of a corporate duty which was due only in the state in which the corporation was organized and had its existence. "A foreign corporation, having no existence without the state of its creation, neither it nor its officers, *qua* officers, can be present in Delaware. Its agents are here as individuals merely, and while its property here may be subject to execution in satisfaction of contracts made, or torts done here by its agents, neither the corporation nor its agents are liable to our *mandamus* to enforce, for the benefit of either

a resident or nonresident of Delaware, any right arising from its corporate duties; for these are obligations due only to the foreign state which created it, and therefore, although there may be jurisdiction over the *custos* and the *res*, for the purposes of actions *ex contractu* and *ex delicto*, there is none over the corporate duty, as there must be to warrant *mandamus* in this state, either at common law, or under our existing constitution and legislation. Apply our writ of *mandamus* to a case like the pending one, and its distinctive character and limitations will be discarded, and it may then issue as well against a private person or partnership as against a public officer or a corporation; and as well to meddle with private affairs as to superintend the public interests. The plea of supposed hardship or inconvenience may possibly induce legislative, but not judicial, enactment in this behalf. In its use of *mandamus* the court of king's bench in England, notwithstanding 'its high and transcendent' supervisory jurisdiction, kept strictly and faithfully *super adequas vias* of the common law until a departure therefrom was authorized by legislative enactment, and the superior court in this state should do likewise. To extend this investigation further is needless. In my judgment it has conclusively demonstrated that the superior court in Delaware has not jurisdiction by *mandamus* over a private incorporation of exclusively foreign creation, its officers, or agents, to enforce the performance of a corporate duty not imposed by any statute of this state, until our legislature has, by further enactment, conferred such jurisdiction. In the absence of such legislation, therefore, the judgment of the court below in awarding the peremptory writ was erroneous and unauthorized."

MANDAMUS LIES TO COMPEL COURTS OF INFERIOR JURISDICTION to do those acts which appertain to their duty: *Arberry* v. *Beavers*, 6 Tex. 457; 55 Am. Dec. 791, and note; *People* v. *Graham*, 16 Col. 347; *Citizens' Bank* v. *Webre*, 44 La. Ann. 1081. For a definition of the writ of *mandamus*, see the extended note to *Dane* v. *Derby*, 89 Am. Dec. 728.

MANDAMUS WILL ISSUE ONLY WHEN THERE IS A CLEAR SPECIFIC RIGHT to be enforced: *Hughes* v. *Commissioners*, 107 N. C. 598; *People* v. *Getzendaner*, 137 Ill. 234; *State* v. *Burnside*, 33 S. C. 276; *North* v. *Trustees*, 137 Ill. 296; *Kansas Nat. Bank* v. *Hovey*, 48 Kan. 20; *Mobile etc. R. R. Co.* v. *People*, 132 Ill. 559; 22 Am. St. Rep. 556, and note; *People* v. *Johnson*, 100 Ill. 537; 39 Am. Rep. 63. See the extended notes to the following cases: *City of Potwin Place* v. *Topeka Ry. Co.*, 37 Am. St. Rep. 317; *Freon* v. *Carriage Co.*, 51 Am. Rep. 798; and *Dane* v. *Derby*, 89 Am. Dec. 729.

MANDAMUS TO ALLOW STOCKHOLDERS TO INSPECT CORPORATE DOCUMENTS. A stockholder in a private corporation may have a *mandamus* to compel the production of its books and papers to enable him to ascertain and secure his rights: *Commonwealth* v. *Phœnix Iron Co.*, 105 Pa. St. 111; 51 Am. Rep. 184; *Winter* v. *Baldwin*, 89 Ala. 483; *State* v. *Bergenthal*, 72 Wis. 314.

HIGGINS *v.* DOWNWARD.

[3 HOUSTON, 227.]

A CORPORATION IS AN artificial being, invisible, intangible, and existing only in contemplation of law, and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.

A FRANCHISE IS a certain privilege conferred by grant from the government and vested in individuals.

CORPORATIONS.—UPON THE DISSOLUTION OF A CORPORATION by the expiration of its charter the debts due to it are extinguished.

A FRANCHISE IS PROPERTY, and cannot, wantonly or of whim, be taken away by a legislative act and transferred to another.

CORPORATIONS.—THE CHARTER OF A RAILWAY CORPORATION IS NOT REPEALED OR DESTROYED, NOR ITS FRANCHISE DIVESTED by a statute purporting to incorporate the purchasers of its railroad at a judicial sale and vest them with all the right, title, interest, possession, claim, and demand at law or in equity of, in, or to such railroad or its appurtenances, and with all such rights, powers, immunities, privileges, and franchises of the corporation as whose property the same was sold, if, in fact, such corporation possessed franchises which were not subject to such sale nor affected thereby.

CORPORATIONS—NONUSER.—The mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years, does not put an end to its franchises, though this may be a good ground for declaring them forfeited by judicial proceedings.

CORPORATIONS.—THE CHARTER OF A CORPORATION DOES NOT EXPIRE BY REASON OF AN OMISSION OR COMMISSION OF ACTS on the part of the company for declaring a forfeiture, but such franchises continue in full force until the penalty of forfeiture is claimed by the state, by and through legal proceedings by which the cause of forfeiture is legally declared.

CORPORATIONS.—ON THE DISSOLUTION OF A CORPORATION ITS PROPERTY BECOMES a fund to be administered in equity for the payment of its creditors, and afterwards for distribution among its stockholders.

RAILWAY CORPORATIONS—JUDGMENT NOT INCLUDED IN A MORTGAGE.—Under a power to mortgage its estate, real and personal, a railway corporation cannot, by mortgaging the road with all rights, privileges, immunities, and franchises, mortgage a judgment in its favor, nor can a judicial sale under such mortgage transfer a judgment existing in favor of the corporation.

RULE to set aside a sale made under a *fieri facias* issued upon a judgment recovered in favor of the Wilmington and Reading Railroad Company. About three years after the entry of such judgment that company had made a mortgage or trust deed, and it was claimed that the judgment had passed by reason of such sale under such mortgage, or under a subsequent act of the legislature incorporating the purchaser at the mortgage sale under the corporate name of the Wil-

mington and Northern Railroad Company, and vested the latter corporation with all the rights, powers, immunities, privileges, and franchises of the corporation in whose favor the judgment was recovered. The superior court granted the rule, and set aside the execution sale made under the judgment in question.

Anthony Higgins, for the plaintiff.

Charles B. Lore, George H. Bates, and Austin Harrington, for the defendant.

[240] SAULSBURY, C. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as the single, individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use": Chief Justice Marshall's opinion in the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 626. A franchise is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchises known to our law: Bouvier's Law Dictionary, 545. By section 17, article 2, of the constitution of this state, it is declared that "no act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two-thirds of each branch of the legislature, and without a reserved power of revocation by the legislature; and no act of incorporation which may be hereafter [241] enacted shall continue in force for a longer period than twenty years without the re-enactment of the legislature, unless it be an incorporation for public improvement." The Wilmington and Reading Railroad Company was a private corporation for public improvement, and therefore its exist-

ence was not limited to the period of twenty years under this provision of the constitution. There was no time fixed by positive provision in the charter of the Wilmington and Reading Railroad Company when the corporation should cease to exist. Had there been, the corporation, in the absence of a renewal of its charter before that period, would have become dissolved without either a representative or the possibility of one, as no provision is made by our laws for a representative in such a case; and at the instant of its dissolution the debts due to it would have become extinguished, not the right to or the remedy for the debts suspended merely, but the debt itself annihilated: *Commercial Bank* v. *Lockwood's Admr.*, 2 Harr. (Del.) 14. A judgment, being No. 181 to the November term, 1869, was recovered by the Wilmington and Reading Railroad Company, a corporation then existing under the laws of Delaware and Pennsylvania, against the defendants. A *fieri facias* was issued, being No. 224 to the November term, 1870, on this judgment, and levy made on goods and chattels. Subsequent executions were issued on this judgment, the last being an *alias venditioni exponas*, No. 92, to September term, 1887. On May 29, 1886, the judgment was marked for the use of the Wilmington and Northern Railroad Company, by the direction of the attorney of the plaintiff, and the judgment was afterwards, on June 12, 1886, marked for the use of John C. Higgins, by direction of the president of the Wilmington and Northern Railroad Company. The defendants allege that at or about the year 1877 the Wilmington and Reading Railroad Company had ceased to have any legal existence as a corporation, or any right to perform or do any act whatever, and that the said judgment which had been recovered by it became void, and of no effect.

The sixth reason assigned for setting aside the sheriff's sale is [243] that the transfers or assignments alleged to have been made by indorsements on the record, and by and through which the said John C. Higgins claims title thereto, were illegal, unauthorized, and void, and ineffectual to vest in said John C. Higgins any right or title whatever. This reason, so far as it relates to the authority of the attorney directing the judgment to be marked to the use of the Wilmington and Northern Railroad Company, is not before us, exceptions thereto having, for the sake of expediting the hearing of the questions reserved, been abandoned; so that the real and only question before us is, Was the Wilmington and

Reading Railroad Company dissolved by the act in relation thereto passed February 22, 1877? or, in other words, Did the legislature, by passing that act, revoke the charter of the Wilmington and Reading Railroad Company? On the 3d of March, 1868, the Wilmington and Reading Railroad Company executed a mortgage upon its road, etc., for the payment of money. A suit was afterwards instituted in the United States circuit court for the foreclosure of this mortgage. The final decree in the case was made April 25, 1876, directing the sale by the trustees of the railroad and property. The sale was made under the decree November 4, 1876. The deed made by the trustees to the purchasers conveyed "the railroad of the Wilmington and Reading Railroad Company, extending from a point on the Philadelphia and Reading railroad, at or near Birdsboro, in the county of Berks, state of Pennsylvania, to the city of Wilmington, in the state of Delaware, with all the rights, privileges, immunities, and franchises of the said Wilmington and Reading Railroad Company, under any and all grants of the state of Pennsylvania, but exclusive of the franchises granted by the state of Delaware." These franchises granted by the state of Delaware were not included in the mortgage, for which foreclosure was decreed, and of course were not included, but excluded, by the decree of foreclosure. They were not sold by the trustees to the purchasers of said road. Of course, therefore, the purchasers of said Wilmington and Reading railroad did not by such sale become entitled to said franchises [243] granted by the state of Delaware. On the 22d of February, 1877, the legislature of Delaware passed an act to incorporate the purchasers of the Wilmington and Reading railroad. This act, after reciting in its preamble that the railroad of the Wilmington and Reading Railroad Company, with its appurtenances, was sold in pursuance of a mortgage executed by said company under authority of laws of this state, and that it was necessary to the proper enjoyment of the rights acquired by said sale that the purchaser should be incorporated with authority to consolidate with any company organized or to be organized under the laws of the state of Pennsylvania, operating such portion of the road so sold as is situated within the state of Pennsylvania, incorporated the persons purchasing the said Wilmington and Reading railroad, under a decree of the circuit court of the United States for the eastern district of Pennsylvania, a body poli-

tic and corporate, by the name of the "Wilmington and Northern Railroad Company." By this act the company were vested with all the right, title, interest, property, possession, claim, and demand at law or in equity of, in, and to such railroad, to wit, the railroad of the Wilmington and Reading Railroad Company, with its appurtenances, and with all the rights, powers, immunities, privileges, and franchises of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at time of such sale. These franchises, granted by the state of Delaware, not being included in the mortgage executed by the Wilmington and Reading Railroad Company, and consequently not sold under the decree of foreclosure thereof made by the circuit court of the United States for the eastern district of Pennsylvania; the purchasers at such sale acquired no title thereto, and no property therein. If they acquired any such title or property, it could only have been under and by virtue of the act to incorporate the purchasers of the Wilmington and Reading railroad, before referred to. This act purported to vest such purchasers, among other things, [244] with the privileges and franchises of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatever in force at time of such sale.

The condition of a corporation whose charter has expired is not the same as that of a corporation which has failed to elect its officers, and, as the consequence of that failure, is rendered inactive. The life of the one is out of it by its own constitution, and not from a failure to do what its charter enabled them to do, to give them active being; the other was entitled by its charter to a continued active life, but it has failed to continue that activity by the election of its necessary officers. Its active powers, but not its being, are gone. The one is dead, the other is dormant. The principles of law which apply to the rights of a corporation thus dormant or disabled are not the same as those which are applicable to the rights of a corporation which is dissolved, or civilly dead. In the former case, debts due are extinguished; not so in the latter case. No judgment of ouster or other similar judgment, or judgment of like effect, has ever been judicially declared against the Wilmington and Reading railroad. The act to incorporate the purchasers of the Wilmington and

Reading railroad did not, in express terms, revoke the charter of the Wilmington and Reading railroad, nor necessarily deprive the latter of its franchises granted by the acts of assembly of the state of Delaware. The Wilmington and Reading railroad had never forfeited its charter as judicially ascertained by any judgment of a court of law; and even the former act did not so declare. A franchise is property, and it cannot wantonly or of whim be taken away by a legislative act, and transferred to another. The act of February 22, 1877, must receive a reasonable interpretation. It must be interpreted to mean that which the legislature of the state of Delaware had a right to do, and not that which the legislature had not a right to do. The rights, powers, immunities, privileges, and franchises conferred by the legislature on the purchasers of the Wilmington and Reading [248] railroad must be interpreted to be such rights, powers, immunities, privileges, and franchises as those conferred by the legislature on the Wilmington and Reading railroad by any act or acts of the general assembly which the Delaware legislature had the right to confer, and to vest the same in said purchasers, because the legislature had the right to make such a grant; but the legislature had no authority to take from the Wilmington and Reading railroad rights, powers, immunities, privileges, and franchises, the same never having been judicially declared forfeited, nor revoked constitutionally by legislative authority. If the legislature had revoked the charter of the Wilmington and Reading railroad it could have granted rights, powers, immunities, privileges, and franchises of the same nature and kind as those which the Wilmington and Reading railroad had theretofore possessed, but not the same identical rights, powers, immunities, privileges, and franchises, because, the charter being revoked, it would follow that the rights, powers, immunities, privileges, and franchises ceased and determined, and were not the subjects of transference to another company by legislative grant. The words "of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at the time of such sale," must be interpreted as having relation to what was sold, and not to that which was not sold, and could not have been legally sold under the said decree of foreclosure. According to this interpretation, the words used would

have force and effect. A contrary interpretation would render the words of the act of assembly inoperative and void.

It appears from the case stated that the judgment in respect to which controversy exists in this case was, on May 29, 1886, marked for the use of the Wilmington and Northern Railroad Company by Victor Du Pont, attorney for plaintiff, and on June 12, 1886, for the use of John C. Higgins, by direction of H. A. Du Pont, president of the Wilmington and Northern Railroad Company. It also appears in like manner that there had been no meeting of the [246] stockholders of the Wilmington and Reading Railroad Company after the sale thereof under the decree of foreclosure aforesaid. If these facts be so, the Wilmington and Reading railroad as a corporation was not dead, nor the debts due it extinguished, so far, at least, as it existed under the laws of the state of Delaware. In this respect it was only dormant; capable of being revived, but incapable of action without such revival. Its life or death rested with the legislature. The views above expressed in reference to extinct and dormant corporations are in accordance to the opinion of the court in the case of *Commercial Bank* v. *Lockwood's Admr.*, 2 Harr. (Del.) 14. "There is," says Morawetz (Private Corporations, secs. 1002, 1003), "a broad and fundamental distinction between the dissolution of the corporation and the loss of its franchise or legal right to exist. Much confusion may be avoided," he says, "by bearing in mind this distinction." Again, he says: "If the charter of a corporation limits its existence to a definite period of time, the franchise or right to exist would expire at the time limited." Again: "The franchise to exist and carry on business as a corporation continues indefinitely unless the time of its duration is expressly limited in the grant." If the corporation should be guilty of any wrongful act, or neglect of duty, which would give the state a right to declare the franchise forfeited, the franchise would nevertheless continue until the forfeiture has been claimed and enforced by the state through the proper legal proceedings. The commission of a wrongful act or neglect of duty by a corporation would evidently not *per se* put an end to the actual existence of the corporate association. After a long-continued nonuser it may be presumed that a corporation has surrendered its franchises to the state; but the mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years,

does not put an end to its franchises, although this may be a good ground for declaring them forfeited by judicial proceedings. The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the company for declaring a forfeiture; [247] but the franchises continue in full force until the penalty of forfeiture is claimed by the state granting the franchise, and this can be done only through a legal proceeding by which the cause of forfeiture is judicially ascertained, and not in a purely collateral proceeding. Says Pierce (American Railroad Law, 11): "The nonuse or misuse of its franchises by a corporation, or its breach of the conditions on which its duration is by the law of its creation made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for the purpose. A nonuser or misuser is a ground of forfeiture, although not expressly declared to be such by statute." The same writer says: "A cause of forfeiture which has not been judicially declared in a direct proceeding cannot be taken advantage of collaterally." The legal modes of proceeding against a corporation for usurpation—nonuser or misuser of a franchise—is *scire facias*, or an information in the nature of a *quo warranto;* each prosecuted at the instance and on behalf of the state.

What becomes of the corporate property of a corporation in the event of its dissolution? The court in the case of *Commercial Bank* v. *Lockwood's Admrs.*, 2 Harr. (Del.) 14, before referred to, say that on the dissolution of a corporation as by the expiration of the period of its charter, its real estate reverts to the grantor, its personal estate to the people, and the debts due to it are extinguished. This is doubtless so at the common law, and in a proceeding at law as a *scire facias* on a judgment; but the more modern doctrine upon this subject seems to be that the capital of a corporation becomes upon its dissolution a fund to be administered in equity for the payment of its creditors, and afterwards for distribution among its stockholders. The creditors have a lien on the assets, and may follow them into the hands of stockholders and persons who are indebted to the corporation. The rights of stockholders in the assets are subordinate to those of creditors: See Pierce on American Railroad Law, 13, and authorities cited. In my opinion, when the constitution of this state speaks of the reserved [248] power of revocation of a corpora-

tion by the legislature, it means an express revocation by the legislature, and not otherwise.

It will be seen from what I have already said that the judgment set forth in the case stated, being No. 181, to the November term, 1869, of the superior court, whether it be a valid and subsisting judgment or not, did not pass to the Wilmington and Northern Railroad Company by virtue of the acts of assembly, mortgage foreclosure proceeding, sale and conveyance recited in the case stated, so as to give the said Wilmington and Northern Railroad Company the right to enforce said judgment by execution issued against the defendants, and that John C. Higgins, who claims to be the assignee of said company to said judgment, has not the right to enforce said judgment against the defendants.

COMEGYS, C. J., concurring. The questions which the case stated, as amended, presents for our opinion are thus expressed in the record from the superior court for New Castle county:

1. Whether the judgment set forth in the case stated, being No. 181, to the November term, 1869, of the said superior court, is a valid and subsisting judgment.

2. If the said judgment is a valid and subsisting judgment, did the title to the same pass to the Wilmington and Northern Railroad Company by virtue of the acts of assembly, mortgage, foreclosure proceeding, sale, and conveyances recited in the case stated, so as to give the said Wilmington and Northern Railroad Company the right to enforce said judgment by execution issued against the defendant.

Although by the twentieth section of the charter of the Wilmington and Brandywine Railroad Company (12 Del. Laws, 142), power was given it from time to time to borrow money for corporate purposes and to execute mortgages of all its estate, real and personal, and to issue bonds to secure the payment of the same"; and [249] by the third section of the act consolidating that company with the Pennsylvania Company, making one company, and incorporating it as the Wilmington and Reading Railroad Company, it is provided that, by the consolidation and merger of the companies, they shall be one corporation possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, liabilities, and duties of such corporations, companies, or railroads consolidated or merged," yet the sixth and last section of such charter restricts

the subject of mortgage to real estate of such consolidated company and like as such features in legislative acts are considered, may be taken to control the prior general provision. This seems to be the law as given at the close of page 558 of Dwarris on Statutes: 9 Law Library. But whether that be correct or not, the general power in the charters of the components of the consolidated corporations could not properly be held in this state to include debts or choses in action under the term "personal estate"; which here has been considered, in its ordinary acceptation or meaning, to apply to corporeal personal property—that is, movable goods, or those chattels which a sheriff can levy upon with a *fieri facias*, which he can impound, and which he can sell and deliver to a purchaser: certainly a debt cannot be levied on with a *fieri facias*. Although a corporate franchise of toll may be subject to seizure by execution, yet this is a special provision of the statutory law of corporations, and does not affect the rule in any other respect. The decree of the circuit court of the United States in the suit against the trustees in the mortgage of the Wilmington and Reading Railroad Company to compel a sale of the mortgaged property expressly excepted from its operation the Delaware franchise as not included in any power to mortgage given by the state. This favors the view that, by the eighth section of the consolidation act before quoted, nothing but real estate could be mortgaged under Delaware authority. That section is in these words: "And that the said corporation may, from time to time, borrow money for corporate purposes and uses, and execute mortgages 250 on all or part of their real estate, and issue bonds to secure the payment of the same."

The only clause or provision, therefore, as appears to be the reasonable view to take, which clothed the Delaware and Reading Railroad Company (the consolidated company which made the mortgage) with power to bind itself by mortgage is that just quoted from its own charter. Whatever the mortgage could include under that power was mortgaged to trustees, and nothing more.

It is not simply a question of intention, where courts, dealing with transactions between man and man, will look beyond their mere letter, if the rules of law will allow them to do so, to reach their true purpose (their being no question of *vires*); but one only to be settled by language, taken in its obvious sense, when found in legislative acts. And no difficulty of

interpretation, with respect to them, where they concern the powers conferred upon corporate bodies to borrow money, can arise, when there is constantly kept in view the fact that corporations have no inherent power, as such, to borrow money at all. They are supposed to be capable, out of the proceeds of the sales of their shares to subscribers, to provide themselves with all money necessary to promote the object of their creation. Hence it is that power to borrow money and secure the payment of it is made an express provision of such charters as create railroad companies and other trade corporations.

It being a rule of law, with respect to corporate bodies generally, that they have no powers but such as are granted to them expressly, or are necessarily implied as concomitants of the granted powers, I find nothing in that part of section 6 (above quoted) of the consolidation act, which would justify us in holding that any thing was intended to be made the subject of mortgage by the Wilmington and Reading Railroad Company but its real estate—its lands, tenements, and hereditaments.

This general view of the *vires* of corporations was in the mind of the circuit court of the United States, no doubt, when it excluded [351] from the operation of the decree the franchises granted by the state of Delaware. It is not pretended that they were sold. The roadbed and all upon it went by the sale; that is, the right (whatever it was) of the Wilmington and Reading Railroad Company to the land of its highway, and every thing upon or attached to it as part of the freehold passed to the purchasers under the foreclosure sale, but nothing else under the authority of the Delaware act; for the decree could not operate in Delaware to subject to sale any property of its creation, or within its jurisdiction exclusively, but that authorized to be mortgaged by the act of February 7, 1866, viz: real estate. Neither a franchise, nor a chose in action, or any purely incorporeal right, depending for its existence upon Delaware law, could be the subject of a mortgage, confined by the terms of the power to make the instrument, to real estate. In this view the purchasers of the property of the Wilmington and Reading Railroad Company sold under the decree of the circuit court aforesaid did not take the judgment against the Downwards. As there was no power by the act of 1866 to mortgage, or pledge, that judgment, it could not be a subject of the mortgage sale;

therefore it remained, as before the sale, a judgment belonging to the Wilmington and Reading Railroad Company. Now what was the effect of the sale, under the decree of the circuit court, upon the property of the Wilmington and Reading Railroad Company within this state? That question I have already answered by stating that it did not touch the franchises of the company, nor a chose in action or any purely incorporeal right depending for its existence upon the law of this state. The argument of the learned counsel for the defendants raised no contention to the contrary of this; but they do insist that the effect of the sale was a virtual annulment of that company's legal entity, and that the act incorporating the purchasers under the sale made by said decree operated its entire extinction. In other words, they claim that, at the time of the transfer of the Downward judgment to the Wilmington and Northern Railroad Company (the new corporation) there was not in existence, [252] for any purpose, the Wilmington and Reading Railroad Company in whose behalf it was recovered; and, therefore, there could be no authority given to, or held by, him who was the attorney of the company when it was a vital body, to make the transfer. The question is then presented—What effect had the sale, and the act incorporating the purchasers under it, upon the life of the Wilmington and Reading Railroad Company? If they destroyed it, then, of course, all acts done in its behalf afterwards, or on its account, were pure nullities.

The counsel for the *cestui que use*, however, denied that the corporation of the Wilmington and Reading Railroad Company was defunct by such agency or influence; and argued to this effect, though by different language—that nothing in and of this state exclusively, except the real estate of that company, could be touched by the sale; that every franchise or right it had which was not necessarily involved in the sale of such estate, remained as its property; and that the act of the legislature incorporating the Wilmington and Northern Railroad Company, and clothing it with all the former company's "right, title, interest, property, possession, claim, and demand at law or in equity of, in, and to such railroad, with the appurtenances, and with all the rights, powers, immunities, privileges, and franchises of the corporation as whose property the same was sold, and which may have been granted thereto, or conferred thereupon, by any act or acts of the assembly whatsoever in force at the time of such sale," etc.,

did not divest the Wilmington and Western Railroad Company of any property whatever.

It is not contended by the defendant's counsel that the legislature, in and by the act incorporating the Wilmington and Northern Railroad Company, intended to exercise its constitutional powers of revocation of charters. It is only reasonable to suppose that when such a course is intended in any case it will be marked by legislative language of purpose, direct and not inferential. While the constitution makes no requirement of form or method for the act, yet, in view of the nature of such a stupendous power, and the [353] consequences to flow or ensue from its exercise, a legislature (it is fair to presume) would not leave its purpose so uncertain as to require the aid of one of its own courts to ascertain and declare it. There would be some expression, in some form or other, that the act relied upon to create revocation was intended for that purpose. I do not mean to be understood as saying that the legislature may not adopt its own method of revoking a charter; but I do believe the act would seem to the body to require expression of purpose to revoke, and would have such purpose distinctly put forth therein. And, looking at the subject in this light, I do not think any court of this state should yield to a mere inference of design to revoke, when language importing purpose of revocation is wanting. The proper view, I think, is, that the legislature, by the act of February 22, 1877, did not intend to revoke the charter aforesaid, but only that which is plainly expressed, as quoted above. Whether there was any power in that body to dispose of the property of the Wilmington and Reading Railroad Company is a question, it would seem, not very difficult to answer. It is quite plain that the general assembly which passed the act of February 22, 1877, did not suppose that the sale by the trustees under the decree of the circuit court of the United States, passed any thing more than the actual real estate of the Wilmington and Reading Railroad Company. This is evident from the preamble to the act, which is in these words: "WHEREAS, under and by force of a decree of the circuit court of the United States for the eastern district of Pennsylvania, the railroad of the Wilmington and Reading Railroad Company, with its appurtenances, was sold in pursuance of a mortgage executed by said company under authority of the laws of this state, and it being necessary to the proper enjoyment of the rights acquired by the said sale

that the purchasers should be incorporated with authority to consolidate with any company organized or to be organized under the laws of the state of Pennsylvania operating such portion of the road so sold as is situated within the state of Pennsylvania. *Therefore*," etc.

[254] The general assembly were correct in this; for it was only real estate it had given the company power to mortgage, and only that which could be sold in execution of the mortgage, or in fulfillment of the trust contained therein. But the legislature of 1877 undertook, in and by the act incorporating the purchasers under the sale by the United States circuit court decree, to grant to the company created the same property they had bought at the sale, that is, "the railroad and its appurtenances," and also "all the rights, powers, immunities, privileges, and franchises of the corporation as whose property the same was sold, and which may have been granted thereto, or conferred thereupon by any act or acts of assembly whatsoever in force at the time of such sale," etc. This, I respectfully submit, amounted of itself to nothing, so far as the railroad was concerned; for the corporators owned that already. As to the other subjects of the intended grant, as they were not capable of being sold under the decree, because not included in the mortgage, they remained the property of the Wilmington and Reading Railroad Company, only to be divested by state legislation in one of two ways—either by revocation of its charter, which, in my opinion, was not done by force of the act incorporating the new company, or any implication arising out of the above-quoted language from it, or by exercising the right of eminent domain —which exercise is always by direct proceedings authorized for that purpose with provision for payment of the property taken. The act is alike silent as to revocation and taking by eminent domain.

It is very difficult to suggest any plausible reason even for the futile grant, except it be that the agent of the new company who framed the bill had not fully looked back into the legislation concerning the Wilmington and Reading Railroad Company to see what it was that the company had power to mortgage; or, if he had, that he had not considered that the franchises of the company were still left to it. As the language of the act quoted above is the same precisely as that of the mortgage where descriptive of the property mortgaged, and of the deed also most probably to the [255] purchasers, he

might well have been misled by such language, and supposed that every thing in Delaware, as well as in Pennsylvania, had been sold. But, as I have pointed out, the mortgage bound nothing in Delaware but real estate, and of course the sale covered nothing else.

To make the clause of the act of 1877 above quoted a reasonable enactment (that is the duty of this court, if it can find means of doing so), we might construe it as being intended to bestow on the new corporation like capacity and privileges, immunities, franchises, etc., as those held by the Wilmington and Reading Railroad Company. But, however, we may think with respect to that, it is perfectly certain that the sale under the decree did not divest the company of any thing but its real estate; nor could the clause of the new charter under consideration operate to that effect, for it neither revoked the former charter, nor did it provide for the exercise of the power of eminent domain with reference to the property not included in the mortgage. Adopting, then, what seems to be the true view—that neither debts, nor choses in action, nor franchises were, by Delaware authority, included in the mortgage of the consolidated company, they could not pass by any sale under such mortgage; and, in fact, did not pass by the sale made to the future corporators of the Wilmington and Northern Railroad Company on the 14th of December, 1876.

It does not appear by the case stated, nor was this court informed in the argument when the debt was created by the Downwards upon which judgment in the superior court of New Castle county was recovered at the November term, 1869. The mortgage, however, was made eighteen months before that time, and could not include the judgment; nor, upon the view that that instrument covered nothing but real estate, could the cause of action which supported the judgment have been embraced by it. And independent of that view, upon the reasoning heretofore put forth, nothing incapable of manual tradition upon a sale by *fieri facias* could be considered as personal estate, the subject of mortgage. Mortgages [256] of goods and chattels in Delaware were never made, much less formally legalized or recognized, until the act of March 23, 1877 (15 Del. Laws, 616). Having thus determined that the judgment against the Downwards did not pass by the sale, by virtue of the decree of the United States circuit court to the purchasers of the Wilmington and Reading

railroad property, it remains to consider the other branch of the question submitted to this court, which is—whether the said judgment is a valid and subsisting judgment?

Reply to that question could easily be made by saying, as the judgment does not appear ever to have been paid or satisfied, it is necessarily valid and subsisting at law. This, however, would not answer the real ends of the case as presented to us in the argument. Neither the learned counsel for the defendants, nor the counsel of the plaintiff, make any contention to the contrary of the view above taken of the mortgage sale; but the former contended that the effect of the act to incorporate the purchasers at such sale as "The Wilmington and Northern Railroad Company" was to extinguish and annul the existence of the old corporation of the Wilmington and Reading Railroad Company. They rely upon the phraseology of section 1 of the act which grants to the former the property of the latter by this language "all its rights, title, property, interest, claim, and demand at law or in equity of, in, and to such railroad, with the appurtenances, and with all the rights, powers, immunities, privileges, and franchises of the corporation as whose property the same was sold, and which may have been granted thereto, or conferred thereupon by any act or acts of assembly whatsoever in force at the time of such sale," etc.

It is not pretended that the judgment itself was extinguished by the act of February 22, 1877—the first section of which in part has been quoted; the point made being merely that the Wilmington and Reading Railroad Company had no legal existence, and therefore could do no legal act, by attorney or otherwise, at the time the transfer was made to the Wilmington and Northern Railroad [357] Company. In reply to this it is sufficient to say that the first point has already been passed upon adverse to such view. The questions presented by the case do not call for any expression on the latter. Upon the facts as stated to us by the superior court of New Castle county, I am of opinion that for any thing that has been shown to the contrary in the argument before us, the judgment in controversy is a valid and subsisting judgment; and that the title to the same did not pass to the Wilmington and Northern Railroad Company by virtue of the acts of assembly, mortgage, foreclosure proceeding, sale, and conveyances recited in the case stated, so as to give the said

Wilmington and Northern Railroad Company the right to enforce said judgment by execution issued against the defendant.

CORPORATIONS—WHAT ARE.—A corporation aggregate is an artificial being created by law, composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession and of acting within the scope of its charter as a natural person: *Fietsam* v. *Hay*, 122 Ill. 293; 3 Am. St. Rep. 492; *Regents* v. *Williams*, 9 Gill & J. 365; 31 Am. Dec. 72. A corporation is a legal entity, separate and distinct from the individuals who from time to time may compose it: *Moore etc. Hardware Co.* v. *Towers Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; *Peires* v. *New Orleans Building Co.*, 9 La. 397; 29 Am. Dec. 448.

CORPORATIONS—FRANCHISES—WHAT ARE.—The franchises of a corporation are property, and may be taken under the power of eminent domain: *Appeal of Pittsburgh etc. R. R. Co.*, 122 Pa. St. 511; 9 Am. St. Rep. 128; *Enfield Toll Bridge Co.* v. *Hartford etc. R. R. Co.*, 17 Conn. 454; 44 Am. Dec. 556. A franchise granted to a corporation, when accepted and acted upon, becomes a vested right which cannot be subsequently impaired or repealed by the granting authorities, provided there is no constitutional prohibition to the granting of such special privileges by the legislature: *Mayor etc.* v. *Houston etc. Ry. Co.*, 83 Tex. 548; 29 Am. St. Rep. 679, and note. The term "franchise," in its appropriate and legal sense, is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant: *Fietsam* v. *Hay*, 122 Ill. 293; 3 Am. St. Rep. 492. See, also, the notes to *Macon etc. R. R. Co.* v. *Gibson*, 21 Am. St. Rep. 148, and *Miners' Bank* v. *United States*, 43 Am. Dec. 118. In the latter note the right of the legislature to repeal corporate franchises is discussed.

CORPORATIONS—NONUSER.—A private corporation may lose its franchises by a nonuser of them, and they may be resumed by the government under a judicial judgment to enforce the forfeiture: *State* v. *Commercial Bank*, 13 Smedes & M. 569; 53 Am. Dec. 106, and note; *State* v. *Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109, and note; *People* v. *Dashaway Assn.*, 84 Cal. 114; *People* v. *Milk Exchange*, 133 N. Y. 565. Nonperformance of the conditions of an act of incorporation is *per se* a misuser, that will forfeit the grant at common law: *People* v. *Kingston etc. Turnpike Road Co.*, 23 Wend. 193; 35 Am. Dec. 551, and note. If a corporation holds its franchise in silence, doing nothing, furnishing no corporate action upon which the state can act, such inaction is corporate conduct which the state may question and punish without searching for a formal corporate act: *People* v. *North River etc. Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843. In the creation of every corporation there is a tacit condition that the franchise may be forfeited for nonuser in regard to matters which go to the essence of the contract between it and the state: *Darnell* v. *State*, 48 Ark. 321. See the extended notes to *State* v. *Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179, and *Atchison etc. Ry. Co.* v. *Nave*, 5 Am. St. Rep. 803.

CORPORATIONS—DISSOLUTION—EXTINGUISHMENT OF DEBTS.—Debts due to and from a corporation are extinguished at common law upon its dissolution: *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412, and note; *State Bank* v. *State*, 1 Blackf. 267; 12 Am. Dec. 234, and note; *Fox* v. *Horah*, 1 Ired. Eq. 358; 36 Am. Dec. 48; *Coulter* v. *Robertson*, 24 Miss. 278; 57 Am. Dec. 168.

CORPORATIONS—DISSOLUTION—RIGHTS OF CREDITORS.—Upon the dissolution of a corporation, its property, real and personal, becomes assets for the payment of its debts and distribution among its stockholders: *State* v. *Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Havemeyer* v. *Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192; *Rouse* v. *Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644, and note; *Welch* v. *Importers' etc. Bank*, 122 N. Y. 177. See a discussion of this question in the extended note to *People* v. *O'Brien*, 7 Am. St. Rep. 717.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

DUNCAN *v.* DUNCAN.

[98 KENTUCKY, 87.]

PARTNERSHIP IN LAND—PAROL PARTITION.—A division of partnership land is void unless evidenced by writing, and if either or both of the partners have taken possession of the land under a verbal agreement for its division, either may repudiate the agreement, and reclaim possession of the land.

PARTNERSHIP LAND IS CONSIDERED AS PERSONALTY only for the purpose of partnership assets with which to pay firm debts, but though sold by the firm for that purpose, the sale is void unless evidenced by writing.

W. O. Rodes, for the appellant.

B. F. Proctor, for the appellee.

BENNETT, J. This action was instituted in the Warren circuit court for a settlement of the partnership between the appellant and appellee, and for a sale of their partnership lands. The trial resulted in a judgment in favor of the appellee for the sum of seventy-six dollars and sixty-five cents, and for the sale of the partnership land.

The appellant complains of so much of the personal judgment as relates to the item of corn. It is sufficient to say, in reference to that matter, that the proof was sufficient to authorize the judgment in favor of the appellee.

The appellant contends that he and the appellee owned two parcels of ground in Warren county in partnership; that they, by verbal agreement, divided the parcels of ground between themselves, each taking the exclusive possession and control of his parcel. If we concede the truth of the appellant's contention, then the question arises, Was the verbal

division and possession thereunder binding on the parties, or did it estop them from repudiating the same? It is contended that, as the land was held [39] and owned for partnership purposes, the title to it could be conveyed as personal estate; and as the law does not require personal estate to be transferred by writing in order to make the transfer valid, the verbal division of the partnership land was binding upon the parties.

Now, does not a conveyance of, or division of, partnership land, in order to be binding upon the parties, have to be made by as solemn an act as a conveyance or division of land not held in partnership? And is it necessary, in order to make a valid division of land, that the same be in writing? This court, in the case of *White* v. *O'Bannon*, 86 Ky. 93, expressly decided that a verbal agreement for the sale or division of land was not valid, but void. That case is in harmony with the other decisions of this court. It is also well settled by this court, that if either or both parties take possession of the land under the verbal agreement, one or both of them may repudiate the agreement and reclaim the possession of the land that he verbally conveyed. The same rule prevails in the case of a verbal division; the same reason exists for both cases, to wit: that the statute requires the sale, etc., to be evidenced by writing; and the sale, therefore, is void unless it is evidenced by writing.

Now, we understand that where partners own real estate for partnership purposes, such estate is considered as personalty for the purpose of partnership assets with which to pay the firm debts only; but for no other purpose is it considered as personalty. It cannot be conveyed by the firm, except by writing, as in other cases. The recent utterance of this court upon this subject is directly in point. It is: "Where the partners own real estate, as such, it cannot be treated or considered as personalty, [40] except for the purposes of the partnership, and then as assets for the payment of firm debts. It cannot be sold by one member of the firm in the firm name, but all the partners must unite in the conveyance. It can be sold to pay partnership debts, but the title must pass as the title of any other real estate": *Carter* v. *Flexner*, 92 Ky. 400.

While land thus owned is, in equity, considered as personal estate for the purpose of paying the firm debts, yet, to carry the rule further and permit it to be transferred or conveyed as personal property may be conveyed—by verbal contract—

would defeat the statute of frauds upon the subject of the conveyance of land. And, as said, a division of the partnership land between partners is governed by the same principle. It is void unless made in writing. Besides, if it were a fact that a verbal sale of partnership land for the payment of the firm debts was valid, the transaction in this case would not be governed by that principle, because the land was not sold or divided to pay the firm debts; and as the realty in such case is impressed as personalty, only for the purpose of paying the firm debts, its character as realty is retained except for that purpose, and any sale or division of it for any other purpose must be evidenced by writing. The doctrine of estoppel does not apply.

The judgment is affirmed.

Partnership Realty is in equity and for partnership purposes to be treated as personalty: *Rovelsky* v. *Brown*, 92 Ala. 522; 25 Am. St. Rep. 83, and note; *Bates* v. *Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133, and note; *Murrell* v. *Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777.

A Parol Partition of Lands is Valid in Texas: *Murrell* v. *Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777, and note, with the cases collected, showing that in other states it is valid only when possession is taken and held in pursuance of it.

South Covington and Cincinnati Street Railway Company *v.* Berry.

[93 Kentucky, 42.]

Municipal Corporations—Injunction Against.—A city may be enjoined to prevent it from maintaining a multiplicity of prosecutions under an invalid ordinance.

Municipal Corporations.—The Powers of a municipality are confined to those expressly granted, or those essential to the execution of the powers so granted.

Municipal Corporations—Ordinances Regulating Street Railways.—An ordinance requiring a street railway company to have both a driver and a conductor on each of its cars is a valid police regulation, and may be enacted under a charter conferring upon the city power to pass all ordinances "necessary for the due and effectual administration of right and justice in said city, and for the better government thereof."

Municipal Corporations—Ordinance Regulating Street Railways—Police Power—Due Process of Law.—A municipal ordinance requiring a street railway company to have both a driver and a conductor on each of its cars, and providing that the police of such city shall cause any car without a driver and a conductor to be returned to the stable, may be valid as a police regulation, if authorized by the city charter,

and in such case the removal of the cars from the street to the stable is not a taking of the company's property without due process of law.

MUNICIPAL CORPORATIONS—POWER TO REGULATE STREET RAILWAYS.—The granting of a charter to operate a street railway does not deprive a city of the power to make reasonable regulations for the enjoyment of such charter in such way as is consistent with the safety of the public.

C. B. Simrall and Alfred Mack, for the appellant.

Charles J. Helm, for the appellee.

[45] HOLT, C. J The appellant, the South Covington and Cincinnati Street Railway Company, has the charter privilege of operating a street railway upon certain streets of the city of Newport. The driver of each car also acts as conductor. The line has been operated in this way for over twenty years.

The board of councilmen passed this ordinance: "That all street-cars running in the city of Newport shall have two persons—a driver and a conductor—on each car; and every failure to have said driver and conductor on each car shall subject the president, and each of the officers of the company controlling said car or cars, to a fine of not less than twenty-five dollars, or more than one hundred dollars, for each and every day; and the police of said city shall cause any car, without driver and conductor, to be returned to the stable."

The appellees, the mayor and chief of police of the city, being about to enforce the ordinance by having the company's officers arrested and its cars returned to the stable, this action was brought enjoining it.

If the ordinance was invalid, then, to prevent a multiplicity of prosecutions and such consequences as would necessarily result from its enforcement, the company had [46] a right to ask preventive equitable relief. This is often done to prevent the illegal exercise of power by municipal authorities: *Brown v. Trustees of Catlettsburg*, 11 Bush, 435; *City of Newport v. Newport and Cincinnati Bridge Co.*, 90 Ky. 193.

The supreme court of the United States said, in *Ewing v. City of St. Louis*, 5 Wall. 413: "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury; or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence."

Several questions are presented as to the ordinance: 1. Had the city the power to enact it? 2. Was it an exercise of police

power? 3. Does it impair the company's contract rights? 4. Can it be enforced by a return of cars to the stable?

The city charter provides: "They [board of councilmen] shall have power to pass all ordinances and by-laws, not in conflict with this charter or the constitution of this state, that may be necessary for the due and effectual administration of right and justice in said city, and for the better government thereof. They may affix such penalties for violation of ordinances, not to exceed one hundred dollars, or imprisonment in the workhouse or jail not exceeding six months, or both, in the discretion of the court, for each offense, as they may deem the good order and welfare of the city may require." [47] It also provides: "They shall have power to cause the removal or abatement of any nuisance."

The powers of a municipality are confined to those expressly granted, or those essential to the execution of those so granted. They are mere agencies of the sovereign authority of the state, and can therefore exercise no powers except those expressly conferred, or those essential to the accomplishment of the purposes of the incorporation. They must be either expressly granted or necessarily implied as incident to those so granted, or essential to the object and purposes of the corporation.

Clearly, no power is attempted to be expressly given in the charter to regulate the number of employees on the street railway cars, or how they shall be operated; but if the requiring of both a driver and a conductor be the exercise of the police power, then the provision of the charter above cited authorized the enactment of this ordinance. If it be not a police regulation, but a mere attempt to enter into and regulate the company's business, then it cannot be sustained.

These cars run between the cities of Newport, Covington, and Cincinnati. The name of the corporation indicates the line. They pass through crowded thoroughfares and centers of crowded population. Persons are constantly getting on and off the cars. They are, in great part, women and children. The cars are apt to be crowded, at least in the morning and evening, as persons go and return from their business. If it is said they have heretofore been operated without both a driver and conductor, it can also be said the cities have grown, and the travel has doubtless increased.

While the privilege has been granted to the company [48] to operate a street railway, yet this does not deprive the

city government of the power to make reasonable regulations for its enjoyment in such a way as will be consistent with the safety of the public. No contract right of the company enters into the question. There has been no attempt to contract away this power; the mere granting of a charter to operate the railway did not constitute any such attempt; and if it had been attempted it would be unavailing, because government cannot divest itself of the police power; and the passage of this ordinance, looking, as it does, to the safety of the public, was a proper exercise of it, and not unreasonable or oppressive in character.

The cases of *Brooklyn Crosstown R. R. Co.* v. *City of Brooklyn*, 37 Hun, 413, where a city ordinance required both a driver and conductor upon each car, and *Ravenna* v. *Pennsylvania Co.*, 45 Ohio St. 118, where the ordinance required a railroad company to keep a watchman at a street crossing to give warning to passers-by of approaching trains, denied the power of the municipalities to enact the ordinances, because the state legislature had reserved to itself the power to regulate these matters. And in *Durst* v. *People*, 51 Ill. 286, 2 Am. Rep. 301, where an ordinance declared all liquor kept within the town for the purpose of being sold or given away, and drunk within the town, a nuisance, and directed the police to remove it beyond the town limits, it was held they could not seize and carry it away save through a judicial instrumentality, as the owner had a right to have it determined whether it was kept for sale or gift, to be drunk in the town, as in that event only was it declared to be a nuisance. Obviously, these cases are not like this one.

[49] It is said, however, that no power existed to direct the return of a car, not having both a driver and conductor, to the stable; that this is an enforcement of the ordinance without a trial, and the infliction of punishment before the party has been found guilty by judicial process. It is in no sense, however, a forfeiture of the property, but merely authorises an effective exercise of the police power. If, for instance, a car were found without both a driver and a conductor, is it to be merely stopped and remain upon the street, blockading travel and constituting a nuisance? Suppose a municipality, in the exercise of the police power, were to forbid the driving of elephants or other wild animals through its streets, and some were found upon them, would it not have the power to direct their removal? It is upon this idea that the impound-

ing of stock, running at large in a town or city, may be authorized by ordinance: *McKee* v. *McKee*, 8 B. Mon. 433.

While they may be removed from the streets, where they, by reason of the ordinance, are a nuisance, yet it is true they cannot be sold and the owner divested of his property without judicial proceeding. This would deprive him of his property without due process of law: *Varden* v. *Mount*, 78 Ky. 86; 39 Am. Rep. 208.

The ordinance in question, however, does not attempt this, but merely protects the public from the danger existing from running the cars without proper control and sufficient force; and, if it be attempted, provides for their removal to prevent their becoming a nuisance.

In the case of the *Railroad Co.* v. *Richmond*, 96 U. S. 521, where an ordinance provided that no car or engine of a certain railroad should be propelled by steam upon that part of its track upon a portion of a certain street in the city of Richmond, it was held that the ordinance did not impair any vested right of the company, nor deprive it of its property without due process of law. It was a mere regulation of the use of it within the city, and not a "taking," within the meaning of the constitutional prohibition.

This is the effect of the ordinance now in question, and the judgment dissolving the injunction against its enforcement is affirmed.

MUNICIPAL CORPORATIONS—POWERS GENERALLY.—A municipal corporation is an inferior body, and has no other powers than those which have been expressly delegated to it, and their appropriate incidents: *Wilson* v. *Beyers*, 5 Wash. 303; 34 Am. St. Rep. 858; *Whiting* v. *Town of West Point*, 88 Va. 905; 29 Am. St. Rep. 750, and note, with the cases collected; note to *Bluedorn* v. *Missouri Pac. Ry. Co.*, 32 Am. St. Rep. 623.

MUNICIPAL CORPORATIONS—POLICE POWER—REGULATION OF RAILWAYS. A municipal corporation has power to impose such reasonable conditions upon a street railway's enjoyment of its franchises as in their judgment the interests of the public seem to require: *Hudson River Telephone Co.* v. *Watervliet Turnpike etc. Co.*, 135 N. Y. 393; 31 Am. St. Rep. 838.

SHACKLEFORD *v.* HAMILTON.

[92 KENTUCKY, 80.]

MARRIAGE—BREACH OF CONTRACT—DEFENSES.—It is implied in every contract to marry that any subsequent change in the mental or physical condition of either party, without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, releases the parties from the agreement.

MARRIAGE — BREACH OF CONTRACT — DEFENSES. — The reappearance of syphilis in a man, without his fault, after he has agreed to marry, believing in good faith that he has been cured of such disease, releases him from his contract, and is a good defense to an action against him for breach of his contract to marry.

Cochran and Son, and Lindsay, Wadsworth, and Son, for the appellant.

E. L. Worthington, L. W. Robertson, M. C. Hutchins, G. S. Wall, and E. Whitaker, for the appellee.

[82] PRYOR, J. Lena Hamilton, the plaintiff below and the appellee in this court, instituted the present action in the Mason circuit, in which she seeks to recover damages for the violation of the promise on the part of the appellant to marry her in pursuance of an agreement to that effect, entered into in the month of December, of the year 1887, by the terms of which they were to marry in the fall of 1888; that subsequently, and by mutual consent, the marriage [83] was postponed until the spring of 1889. No day was designated for the consummation of the contract, but it is alleged that in the month of April, 1889, the defendant, against the consent of the plaintiff, announced to her that he would not perform his contract at any time or place; that the plaintiff was willing and ready to perform her contract at any time or place the defendant might designate, and offered to do so, of which fact the defendant had notice; that he failed and refused to execute his contract of marriage with her, and still refuses.

On the 19th of April, 1889, the plaintiff had served on the defendant the following notice:

"MR. JAMES SHACKLEFORD: You are hereby notified that I am ready, able, and willing to perform our contract of marriage, and to become your wife at any time and place you may designate, and am now ready, and propose to fix a time and place at which our engagement of marriage may be consummated. Very respectfully,

"LENA HAMILTON."

An answer was filed by the defendant admitting the existence of the marriage contract and his failure to consummate it, and presents in his answer the following defense, to which a demurrer was sustained, and the question here is: Was that defense a bar to the recovery? as, on the demurrer, the facts alleged stand admitted.

The defendant says that at the time he made the contract to marry the plaintiff he believed himself to be in good and sound health, and knew of no impediment to its consummation; that long prior to any contract of marriage with the plaintiff he contracted a loathsome disease, called syphilis, and was treated for it by skilled [84] physicians until he was pronounced cured and free from the malady; that this was long before he made the acquaintance of the plaintiff; that he consulted two reputable physicians, and one of whom made a thorough examination of his person and advised him there was not the slightest evidence of the existence of the disease, and this was long before he thought of marrying the plaintiff or any one else; that his regular physician, who had treated his disease, advised him that he was cured and in a fit state to marry, and could safely do so; that after this time, and with the belief in good faith that the malady no longer existed, he made the contract with the plaintiff, induced by the love and affection he had for her. He says that, after the engagement to marry, and without any fault on his part, symptoms of the disease again appeared and is now upon him, and he is advised by his physicians that he ought not to marry; that prior to the bringing of this action he made known to the plaintiff the grounds for his refusal, etc.

After sustaining the demurrer to the answer, the court below permitted testimony of defendant's condition to go before the jury in mitigation of damages, and the facts alleged in the answer are all sustained by the testimony of skilled physicians who treated him, and that good faith prompted the conduct of the defendant in refusing to marry the plaintiff. He continued to visit the plaintiff regularly, with no evidence of any diminished affection until the return of the symptoms of this loathsome disease, that one of the physicians states is in its worst form. When the engagement was broken, he said to the plaintiff that he could make no explanation of his [85] course, except to say to her: "You would not want to marry a man who would be sure death to you."

After the notice was served on him of the readiness of the appellee to fulfill her engagement, and before the action was instituted, he wrote to the plaintiff as follows:

"I engaged in good faith to marry you, and I am surely the party most aggrieved by my inability to do so. The condition of affairs has caused me more suffering than you can possibly, and doubtless more than you have felt, but I am compelled, as an honorable man, to save you from that fate that would await you as my wife. You can but respect me the more when you know all. I cannot tell you more; but I had a talk with your lawyer, Mr. Hutchins, and I refer you to him. I believed myself able to marry you, but recent developments have convinced me of my mistake, and it would be a crime were I to do so. Think of me and my misfortunes as kindly as you can, etc. Respectfully,

"JAMES SHACKLEFORD."

We can well see how such a letter might be penned with a view of escaping responsibility in the way of damages instead of being prompted by an honest conviction of right on the part of the defendant; but when his physicians testify as to facts, all of which are uncontradicted, that leave no doubt as to his good faith and of his belief that he was permanently cured long prior to his engagement with the plaintiff, the sole question arises as to the sufficiency of the answer; and we have alluded to the facts, only because they stand uncontradicted and were offered in mitigation.

The court below, entertaining the opinion that as the defendant had entered into this marriage contract he is so bound for its breach, although it might have been the duty of the appellant, under the circumstances, to decline to execute it, sustained the demurrer to the defense; that the contract was unconditional, and the defendant being able at the time the promise was made to perform the contract, he must either execute it or become responsible in damages for the breach. If such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement when entered into is to be treated as creating a *status* that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agree-

ment, it must follow that the defense interposed to the appellee's claim for damages was, in law as well as morals, sufficient to prevent recovery. When the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agree to cherish each other in sickness and in health, the fact that the social standing of the one party or the other, or their pecuniary condition, was not as represented, will afford no ground for relief; still, when there is a mere agreement to marry, there may be such a condition of the one party or the other as to health or other bodily infirmity arising subsequent to the agreement as would authorize either party to decline to enter into the marriage relation, and to hold otherwise would be to place such a contract upon the same footing with cases of mere personal chattels.

It is said by Mr. Bishop in his work on Marriage and [87] Divorce that, "one after marriage cannot complain of an impediment known to him before; but if he were ignorant of the existence of the defect, or of its incurable nature, though in himself, he may take advantage of it by suit of nullity. The marriage was a mistake; the ends intended by it cannot be answered": 2 Bishop on Marriage and Divorce, 6th ed., 582.

The text-books establish the doctrine that, "without sexual intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony, cannot be attained." The first cause and reason of matrimony, says Ayliffe, "ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely: a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence": 1 Bishop on Marriage and Divorce, 6th ed., 822.

It is not pretended, nor has it been so adjudged in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract after it has been entered into and without his fault, as would render him less capable of discharging duties growing out of the marital relation, would be sufficient to justify its breach; but when the party is afflicted with bodily disease to such an extent as is dangerous to the lives of those with whom he comes in contact, and such as must, if he should marry,

necessarily be communicated to his wife by sexual intercourse, and through her to affect their offspring with the poison, connected with the fact that he was ignorant of the disease being upon him [88] at the time he contracts to marry, he will be excused for the nonperformance of his undertaking.

While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party, without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, will release the parties from the agreement. Impotency, insanity, or such a diseased condition of the body as would affect the offspring and endanger the life of the mother if the contract were carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property, where the party can recover damages for the breach, although it is impossible to perform it; in other words, it is urged that the woman must have either the husband or damages in his stead if he is able to have the marriage ceremony performed.

This is also the objection to the majority opinions rendered in the court of queen's bench in the case of *Hall* v. *Wright*, El. B. & E. 746. We concur with the minority opinions in that case, that the contract of marriage is subject to implied conditions peculiar to itself. In that case the defense was that, after the promise and before the breach, the defendant was afflicted with bleeding from the lungs, and by reason of that disease became incapable of marriage without great danger to his life, and, therefore, unfit for the married state, of which the plaintiff had notice. After reviewing the authorities upon the question, Erle, Justice, said: "The principle deduced from the cases seems to be, that a contract to marry is assumed in [89] law to be made for the purpose of mutual comfort, and is avoided if by the act of God or the opposite party the circumstances are so changed as to make intense misery instead of mutual comfort the probable result of performing the contract." The majority opinion was rendered on the idea that the disease was not such a state of health as to make it impossible for the defendant to marry, and, therefore, not impossible of performance; and if a case

like the one being considered had been presented, we doubt if any difference of opinion would have been expressed.

Pollock and other text writers on contracts, in alluding to this opinion, say that it is so much against the tendency of the later cases that it is now of little or no authority beyond the point decided; but if that opinion had been unanimous, although entitled to great weight, we would not be inclined to follow its reasoning or concur in the conclusion reached.

The only American case we have found on the question is reported in *Allen* v. *Baker*, 86 N. C. 91, 41 Am. Rep. 444, the opinion delivered by Justice Ruffin. In that case the defendant refused to comply with his contract because he was afflicted with a disease similar to the one this defendant had. The disease was contracted before the contract was entered into, but the defendant had been advised, and in fact believed, that it could be cured in time to enable him to fulfill his engagement. Acting in good faith and from a conscientious conviction that his disease was incurable, he refused to comply with his agreement, and the court in that case said: "We cannot understand how one can be liable for not fulfilling a contract when the very performance of it ** would in itself amount to a great crime, not only against the individual, but against society itself."

The present case is much stronger for the defense than the case cited. In the one case the defendant knew the disease was upon him when he made the contract, but was advised that he would be well in time to consummate it, while in this case the defendant believed he was well at the date of the contract, and had been so advised by his physician long before the contract was entered into. While it is not necessary that this court should sanction the ruling of the court upon the facts in *Allen* v. *Baker*, 86 N. C. 91, 41 Am. Rep. 444, to adjudge that it was the duty of the defendant to marry the plaintiff under the circumstances, and avail himself of his conjugal rights that must necessarily communicate this loathsome disease to his wife and to their offspring, or to inflict upon him punishment by way of damages for not executing the contract, would, as said in *Allen* v. *Baker*, 86 N. C. 91, 41 Am. Rep. 444, be compelling him to do that which is against all law, human and divine.

It is impossible for the defendant to fulfill his contract. His disease renders him incapable of marriage without actual damage to the life of the woman he marries by communicating

to her and, through her, to their offspring a loathsome disease that is now, from the testimony in the case, gradually destroying this unfortunate man. He was guilty of a moral wrong in contracting the disease, but at that time was under no obligation to the appellee; and it may well be asked, What obligation now rests upon him? If he had complied with his agreement and executed the contract by an actual marriage with the plaintiff on a designated day, as required by her notice, would [91] he not have inflicted upon the plaintiff an injury that no amount of damages could have repaired?

The appellant, in his interview with the appellee, made manifest to her that her life would be made miserable if the contract was carried out. He then gave to her counsel the real facts as to his condition, and referred the plaintiff to him. That the plaintiff had notice of his condition before suit was brought is manifest. His obligation to the plaintiff by reason of the agreement with her was to abandon at once all idea of carrying it into execution. No greater crime in law or morals could have been committed by the appellant than a performance of his agreement. The purity of our social system, the interest of the public in preserving sacred the marital relation, the protection of those whose existence may spring from such an unholy alliance, as well as the future welfare and happiness of the parties themselves, require that such a construction should be given this class of contracts; and if there was no precedent for the recognition of the doctrine announced we would not hesitate to make one.

In our opinion the answer and the amendment presented a valid defense. The demurrer, therefore, should have been overruled.

The judgment is reversed and cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

Defenses to Actions for Breach of Promise to Marry.*

MARRIAGE—BREACH OF PROMISE—DEFENSES.—*Plaintiff's Unchastity Unknown* to the defendant at the time the promise was made, is a good defense to an action for a breach of promise to marry: *Irving* v. *Greenwood*, 1 Car. & P. 350; *Von Storch* v. *Griffin*, 77 Pa. St. 504; *Bell* v. *Eaton*, 28 Ind. 468; 92 Am. Dec. 329; *Denslow* v. *Van Horn*, 16 Iowa, 476; *Woodard* v. *Bellamy*, 2 Root, 354; *Espy* v. *Jones*, 37 Ala. 379; *Berry* v. *Bakeman*, 44 Me. 164; *Capehart* v. *Carradine*, 4 Strob. 42; *Goodall* v. *Thurman*, 1 Head, 209; *Morgan* v. *Yarborough*, 5 La. Ann. 316; *Butler* v. *Eschleman*, 18 Ill. 44; *Burnett*

* REFERENCE TO MONOGRAPHIC NOTE.

Breach of promise to marry: 68 Am. Dec. 52–55.

v. *Simpkins*, 24 Ill. 264; *Willard* v. *Stone*, 7 Cow. 22; 17 Am. Dec. 496. The general rule is thus stated in *Espy* v. *Jones*, 37 Ala. 384: "If any man has been paying his addresses to one that he supposes to be a modest person and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage he may have made to her; but to entitle the defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account; and they must also be satisfied that the defendant did not know her character at the time of the promise, for if a man knowingly promise to marry such person he is bound to do so." That plaintiff had had a bastard child ten years before the promise to marry was made, though she had since led a correct life, the defendant having no notice of the facts is a good defense to an action for a breach of such promise: *Bench* v. *Merrick*, 1 Car. & K. 463. The fact that plaintiff fraudulently concealed from defendant the fact that she had had a bastard child is a good defense: *Bell* v. *Eaton*, 28 Ind. 468; 92 Am. Dec. 329. If the plaintiff is delivered of a child after the promise, not begotten by the defendant, this is a good defense: *Goodall* v. *Thurman*, 1 Head, 209. If plaintiff has given birth to a child before the promise, unknown to defendant, this is a good and sufficient defense: *Denslow* v. *Van Horn*, 16 Iowa, 476.

Plaintiff's Unchastity Known to defendant at the time that the promise to marry was made is no defense to an action for a breach of the contract: *Johnson* v. *Travis*, 33 Minn. 231; *Espy* v. *Jones*, 37 Ala. 379; *Kelley* v. *Highfield*, 15 Or. 277; *Snowman* v. *Wardwell*, 32 Me. 275; *Berry* v. *Bakeman*, 44 Me. 164; *Denslow* v. *Van Horn*, 16 Iowa, 476.

Illicit intercourse between the parties after the promise to marry is made is no defense to an action for its breach: *Felger* v. *Etzell*, 75 Ind. 417; *Powell* v. *Moeller*, 107 Mo. 471; *Kelley* v. *Highfield*, 15 Or. 277; *Johnson* v. *Smith*, 3 Pittsb. Rep. 184. Plaintiff's immorality and fornication with third persons after the promise is no defense for its breach, if done with the defendant's connivance or consent: *Johnson* v. *Smith*, 3 Pittsb. Rep. 184; or, if knowing it, he continued his attentions and his engagement: *Snowman* v. *Wardwell*, 32 Me. 275.

If a man breaks his promise to marry after he has seduced the woman, and does so on insufficient grounds or for no reason at all, the fact of her previous unchaste conduct or incontinence of which he had no notice or suspicion at the time or before he breaks the engagement, is no defense in an action to recover for such breach: *Sheahan* v. *Barry*, 27 Mich. 217. It was however, decided in *Sprague* v. *Craig*, 51 Ill. 288, that if either party is guilty of acts of unchastity subsequently to the engagement to marry, the other is absolved from the performance of the contract whether such acts were known to the latter or not.

Immoral Consideration—Against Law or Public Policy.—A promise of marriage to be consummated in future in consideration of present illicit intercourse between the parties is void, and such consideration is a perfect defense to an action for the breach of such promise: *Hanks* v. *Naglee*, 54 Cal. 51; 35 Am. Rep. 67; *Steinfeld* v. *Levy*, 16 Abb. Pr. 26; *Baldy* v. *Stratton*, 11 Pa. St. 316; *Goodal* v. *Thurman*, 1 Head, 209. A promise of marriage by a man to his mistress in consideration of her continuing in the unlawful relation is void, and cannot be enforced: *Boigneres* v. *Boulon*, 54 Cal. 146. A promise to marry a woman at a certain time, but to marry her immediately if she should become pregnant by the defendant, is not void for immorality in the consideration, and the fact that the promise was so made is no defense

to an action for its breach: *Kurtz* v. *Frank*, 76 Ind. 594; 40 Am. Rep. 275. A promise to marry made after the defendant has seduced plaintiff that she shall come to no harm by him, and that if she does he will marry her, when she is at the time pregnant with child by him is binding: *Hotchkiss* v. *Hodge*, 38 Barb. 117. A promise to marry made by a divorced man prohibited from remarrying in the lifetime of his divorced wife is void, and the fact that he is so divorced may be set up as a defense: *Haviland* v. *Halstead*, 34 N. Y. 643. A promise of marriage by one incurably impotent is against public policy, and such impotency may be pleaded as a defense: *Gulick* v. *Gulick*, 41 N. J. L. 13. The physical inability of the woman to have sexual intercourse is a defense in an action for breach of promise to marry her: *Gring* v. *Lerch*, 112 Pa. St. 244; 56 Am. Rep. 314. And if such physical defect in the woman can be remedied by a surgical operation which she fails to have performed, her neglect absolves the man from his contract to marry her: *Gring* v. *Lerch*, 112 Pa. St. 244; 56 Am. Rep. 314. A promise to marry plaintiff, if defendant ever marries, is in restraint of marriage, and cannot be enforced while it may be alleged in defense: *Conrad* v. *Williams*, 6 Hill, 444.

Relationship between the parties of such nature as prevents them from marrying each other under the statute is a perfect defense to an action for a breach of promise to marry: *Reed* v. *Reed*, 49 Ohio St. 654; *Campbell* v *Crampton*, 18 Blatchf. 150. If such contract is void under the law of the state where it is made the relationship is a defense, although the marriage is not prohibited by the law of the place where it is to be performed: *Campbell* v. *Crampton*, 18 Blatchf. 150.

Infancy.—An infant if sued for a breach of his contract to marry may interpose his infancy as a defense to the action, and if such infancy is proved it constitutes a perfect defense: *Hunt* v. *Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard* v. *Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Morris* v. *Graves*, 2 Ind. 354; *Frost* v. *Vought*, 37 Mich. 65; *Leichtweiss* v. *Treskow*, 21 Hun, 487; *Rush* v. *Wick*, 31 Ohio St. 521; 27 Am. Rep. 523. The fact that the infant has seduced the plaintiff under promise of marriage does not cut off the infancy as a defense for the breach: *Leichtweiss* v. *Treskow*, 21 Hun, 487. Infancy is matter of defense, however, and the plaintiff need not allege nor show that defendant was of full age at the time of the promise: *Simmons* v. *Simmons*, 8 Mich. 318.

Marriage.—The fact that a person is already married at the time he makes a promise to marry another is no defense to an action to recover damages for the breach of such promise, if the plaintiff was at the time ignorant of the fact of such prior marriage: *Kelley* v. *Riley*, 106 Mass. 339; 8 Am. Rep. 336; *Blattmacher* v. *Saal*, 29 Barb. 22; *Cover* v. *Davenport*, 1 Heisk. 368; 2 Am. Rep. 706; *Pollock* v. *Sullivan*, 53 Vt. 507; 38 Am. Rep. 702. And the fact that plaintiff, after the contract was entered into, found the defendant to be a married man, and did not at once repudiate the contract, but continued to receive his attentions, urging him to procure a divorce and marry her, is not a bar to recovery: *Cover* v. *Davenport*, 1 Heisk. 368; 2 Am. Rep. 706.

Duress or Fraud.—The fact that the promise to marry was made under duress is a good defense to an action for its breach: *McCrum* v. *Hildebrand*, 85 Ind. 204. If the defendant was induced to enter into or continue a contract of marriage by misrepresentations or willful suppression of facts as to plaintiff's family or prior habits of life, by the plaintiff or with her consent, this constitutes a valid defense to an action to recover for a breach of the

contract: *Wharton* v. *Lewis*, 1 Car. & P. 529; *Foote* v. *Hayne*, 1 Car. & P. 545.

Offer to Marry.—A *bona fide* offer by defendant to marry plaintiff is a good defense to an action for breach of the promise to marry, if made before plaintiff has signified her intention and determination to end the engagement, though defendant may have been guilty of conduct that would warrant the plaintiff in considering the engagement at an end: *Kelly* v. *Renfro*, 9 Ala. 325; 44 Am. Dec. 441. But an offer on the part of the defendant to renew the contract after the breach is no defense: *Kurts* v. *Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Southard* v. *Rexford*, 6 Cow. 255.

Previous Contract.—It is no defense to an action for breach of promise of marriage that the plaintiff had previously contracted to marry another: *Roper* v. *Clay*, 18 Mo. 383; 59 Am. Dec. 314. The fact that at the time of the promise the plaintiff was engaged to marry another man, and fraudulently represented to defendant that she was not so engaged, is not a defense to an action for a breach of the promise if the defendant continued his engagement to plaintiff after learning of such previous engagement and its discontinuance: *Alberts* v. *Alberts*, 78 Wis. 72.

Mutual Rescission of the contract prior to the alleged breach is a complete defense to an action to recover damages for a breach of a contract to marry: *Shellenbarger* v. *Blake*, 67 Ind. 75.

Loss of Affection by the defendant for the plaintiff before suit is brought is no defense to an action for his breach of promise to marry her: *Richmond* v. *Roberts*, 98 Ill. 472. Nor is it any defense that defendant thought that the marriage would not conduce to the happiness of both parties, and for that reason broke off the engagement: *Coolidge* v. *Neat*, 129 Mass. 146. But the defendant may show in defense declarations made by the plaintiff a few days after the breach, that she cared nothing for him, that all she wanted was his money, that she only intended to marry him to spite his family, that she refused to live at his house, and did not intend after their marriage to live with him at any residence he provided. If proved, these facts constitute a good defense for a breach of the promise of marriage: *Miller* v. *Rosier*, 31 Mich. 475.

Return of Engagement Ring by the plaintiff to the defendant after he told her that he loved her no longer, but loved another, and would not marry plaintiff, is not a rescission of the contract to marry on her part, and constitutes no defense to her action to recover damages for a breach of such contract on the part of defendant: *Kraxberger* v. *Roiter*, 91 Mo. 404; 60 Am. Rep. 262.

Breach of Criminal Law by plaintiff is no defense to her action for a breach of promise to marry, especially when there is no evidence that defendant was informed thereof or refused to marry plaintiff on that ground: *Berry* v *Bakeman*, 44 Me. 164.

Frequent Intermarriages of Ancestors of the parties is no defense to an action for breach of promise of marriage when the contract was not broken off on that ground: *Simmons* v. *Simmons*, 8 Mich. 318.

Intemperate Habits of plaintiff is not a defense under a general denial in an action for breach of promise to marry: *Button* v. *McCauley*, 1 Abb. App. Dec. 282, reversing the same case in 38 Barb. 413.

Disease.—That defendant was afflicted with venereal disease, rendering him unfit to marry, is no defense to his breach of promise if the disease was contracted thereafter or if before, and he knew that his infirmity was incurable; but if the disease was contracted prior to the promise to marry, and

he had reason to believe that the disease was temporary only, he is excusable for a breach of his contract resulting from a knowledge afterwards acquired that it was of long duration and probably incurable: *Allen* v. *Baker*, 86 N. C. 91; 41 Am. Rep. 44. That defendant subsequently to his promise became afflicted with an incurable disease, causing bleeding at the lungs, and could not marry without danger to his life, is not a good defense for his breach of promise to marry: *Hall* v. *Wright*, 96 Eng. Com. L. 746; El. B. & E. 746. That plaintiff had been insane and confined in an asylum before the promise to marry her was made is no defense for its breach if she was sane at the time the promise was made and broken: *Baker* v. *Cartwright*, 10 Com. B., N. S., 124; 30 L. J. Com. P. 364; 7 Jur., N. S., 1247.

LOUISVILLE UNDERWRITERS *v.* PENCE.

[98 KENTUCKY, 96.]

MARINE INSURANCE—FORFEITURE FOR FAILURE TO PAY PREMIUM.—A policy of marine insurance, providing that it shall be void upon the failure of the insured to pay the premium within a certain time after maturity and demand, is not rendered void, but voidable only, by a breach of such condition, and the insurer may elect to continue the policy in force, notwithstanding the default in the payment of the premium.

MARINE INSURANCE—NEGLIGENCE OF MASTER AS AVOIDING POLICY.—When a marine policy insures against the perils or "unavoidable dangers" of the sea or river, the mere neglect of those in charge of the vessel, in making a landing or otherwise, does not free the insurer from liability.

SHIPPING—GENERAL AVERAGE—RULE OF, WHEN APPLIES.—The rule of general average applies only when there is common danger to the vessel and to the cargo; and then every thing which is saved by one continued unremitted effort must pay the expense in proportion to its value. This rule does not apply when the expenses involved are not incurred for the common benefit of the vessel and cargo, as where the cargo is taken off to lighten the vessel, and not because the cargo is in danger. Expenses incurred for a separate interest, and not for the common benefit of vessel and cargo, are chargeable to that interest only.

MARINE INSURANCE—ABANDONMENT, WHEN VALID.—If, in all probability, the expenditures that must be incurred to deliver an insured vessel from peril will be more than half her value, and if her peril is such that a considerate owner, if uninsured, would not attempt to save her because of such great expense, an abandonment as for a total loss is valid, under a policy of insurance providing that there shall be no abandonment, as for a total loss, unless the injury sustained is equal to fifty per cent of the agreed value of the policy. In such case the fact that the vessel does not ultimately prove an absolute or total loss does not defeat the claim for the insurance.

MARINE INSURANCE—ABANDONMENT—WHAT CONSTITUTES.—An abandonment of an insured vessel as for a total loss, to give the insured the right to claim the full amount of insurance, must include not only an intention to abandon, but a relinquishment of all right to the property, and although the insured may give notice to the insurer of an intention

to abandon, yet, if he all the time continues to hold against the right of the latter, and to claim and use the property as his own, there is, in fact, no abandonment; and he can recover upon the policy only what may in fact be his loss.

Lincoln, Stevens, and Lincoln, Marshal and Lochre, and Brown, Humphrey, and Davie, for the appellants.

B. F. Buckner, E. F. Trabue, and John L. Scott, for the appellee.

HOLT, C. J. This is an action upon a marine policy of insurance.

The appellant, the Louisville Underwriters, issued it to the appellee, S. V. Pence, on November 26, 1885, insuring his steamboat, the Hibernia, valued at six thousand dollars, in the sum of four thousand dollars, for one year. The first premium note of one hundred and twenty dollars matured on February 26, 1886, and was unpaid, when on April 14, 1886, the boat was stranded upon the Kentucky river. It was returning to Louisville from a trip up the river with a cargo worth perhaps nine thousand dollars. Owing to a rise the river was out of its banks. The boat, upon a third effort, made a landing upon or beyond the top of the river bank to take on some freight, but stuck there. The river was falling rapidly, and in a few hours the greater portion of the boat was high and dry upon the bank, while the other part was in the water. The entire cargo was removed within a few hours after the boat grounded, but it thus remained for over fifty days, although much labor was being constantly expended in the effort to get it into the river. It did not break in two, but its timbers were bent and strained, many of them, in fact, broken, and when at last released, it had, in its leaky condition, to be towed by other boats to a place for repairs. All this, aside from the removal of the cargo, involved an expense of three thousand three hundred dollars.

There is evidence tending to show that within a few hours after the boat stranded, the owner, who was also at the time in charge of it as master, sent a man to the appellant's home office with the word, and perhaps a letter, to the effect that it was stranded; and the appellant could take charge of it.

The evidence clearly shows, however, that notwithstanding this notice the appellee retained control of the boat, and after having it repaired, claimed, controlled, and used it as his

own, and so far as appears, has done so ever since; at least he was so doing when this action was tried below in March, 1888.

It was brought for a total constructive loss, and a verdict obtained for the full amount of the insurance.

The policy provides: "The perils which this company hereby assume under this policy are the unavoidable dangers of the rivers. This policy shall become void in case the note or other obligation given for the premium therefor be not paid within fifteen days after maturity and demand, and remain void during the time the same shall be overdue and unpaid. This company shall be free from all claims for loss or damage [100] arising from or caused by barratry. There shall be no abandonment as for a total loss, on account of said vessel grounding, or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained, inclusive of any general average claim, be equivalent to fifty per centum of the agreed value of this policy. The insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short rates, and the deductions shall only be made on the whole months of unexpired time. The insurance may also, at any time, be terminated at the option of the company, on giving five days' notice to that effect, and refunding a suitable proportion of the premiums for the unexpired term of this policy."

The company claims the policy was canceled at the request of the assured prior to the accident. This, however, was not pleaded. At the close of the testimony the appellant proposed to do so by an amended answer then tendered. It was properly rejected. While there was some evidence to to this effect, yet the decided weight of the testimony was otherwise. The action had been pending nearly two years and, if true, it must have been known to the company when it filed its answer.

Its defenses are that the policy was not in force at the time of the accident, because the first premium note was then overdue more than fifteen days, and its payment had been demanded; that the accident was the result of the negligence of the master of the boat, and that it was a case for general average, requiring the cargo to contribute ratably to the expense or loss, whereby the underwriter would be relieved to a certain extent.

[101] The nonpayment of the premium note for fifteen days did not, *ipso facto*, render the policy void. It rested with the company whether it would so treat it. It was voidable at its option. It could elect to consider the policy in force notwithstanding the default in payment. If this were not so, then a party desiring to annul a contract would only need to make default to accomplish his purpose, although the other party, and who would not be in fault, might elect to continue it.

In *Stevenson* v. *Phœnix Ins. Co.*, 83 Ky. 7, 4 Am. St. Rep. 120, where a policy provided, if the assured should thereafter take out other insurance upon the property insured, it should be void, it was held that a breach of the condition made it voidable only at the election of the insurer.

Whether the appellant had waived the payment of the premium note and the consequent forfeiture of the policy was submitted to the jury by proper instructions.

It is settled that where a policy insures against the perils of the sea or river, the mere neglect of those in charge of the vessel will not free the insurer of liability. The fact that the want of judgment or skill of the master in charge may have contributed to the loss will not preclude a recovery of the underwriter. This is settled law in both England and thie country.

If the proximate cause of this loss be a peril insured against, then it is covered by the policy, although it may have been occasioned remotely by the negligence of the master. His misconduct, unless tainted by design or fraud, will not defeat a recovery.

It was held in *General Mut. Ins. Co.* v. *Sherwood*, 14 How. 351, if the loss be occasioned by a peril of the sea the insurer is liable under a policy against the usual [102] perils of the sea, although the master of the vessel did not use due care to avoid the peril.

If the peril was the operative cause of the loss the inquiry goes no further—the cause of the peril will not be sought: *Orient Ins. Co.* v. *Adams*, 123 U. S. 67.

In the case now before us there is no evidence showing any fraudulent conduct upon the part of the master of the boat; and even if the landing was careless or ill-advised, yet it cannot defeat a recovery.

It is said, however, the policy in this case only insures against such dangers as are "unavoidable," and that this word is not to be found in the policies which were under consider-

ation in the cases above cited. It does not refer, however, to the duties of those in charge of the boat, but to such perils as are incident to navigation, and from their nature inseparable from it. It relates to the perils embraced by the policy, and not to the skill and care to be exercised by the master of the boat. If this were not so there would have been no need of the policy providing that the insurer should not be liable in case of barratry. If the company was not to be liable in any case where the loss might be avoided by skill and care upon the part of the master, certainly a further provision against loss arising from fraud or evil design upon his part was unnecessary, and the policy is to be construed most strongly against the insurer. The use of this word in the policy did not, therefore, render the rule referred to inapplicable to this case, and the jury were in this respect also properly instructed.

This case is not one for general average.

It has been defined to be "a loss arising out of extraordinary [103] sacrifices made, or extraordinary expenses incurred, for the joint benefit of the ship and cargo." It is founded upon the plainest principles of common justice. So much so, that it was in force, at least in a crude form, at an early day among commercial nations. The ancient Rhodian law furnished an example which was adopted by the Romans. The rule is that where there is a common danger to the vessel and the cargo, every thing which is saved by one continued, unremitted effort shall pay the expense in proportion to its value. For this purpose the ship is in lien to the cargo and the cargo to the ship. If the expense be incurred for the joint benefit in case of a common peril, and where there is imminent danger of all being lost, it is but natural justice and equitable that whatever is saved by the sacrifice shall contribute according to its value to the loss. "What is given for the general benefit of all shall be made good by the contribution of all."

So far has this rule been carried in this country that a portion of a cargo, saved with but little trouble, but constituting by far the greater portion in value of the property in peril, has been compelled to contribute to the entire expense in proportion to its value. Thus, in *Bevan* v. *Bank of the United States*, 4 Whart. 301; 33 Am. Dec. 64, there was a large amount of specie on board. It was first taken off, and, owing to its nature, with but little trouble; but it was required to

contribute to the entire expense by way of general average. This case has, however, owing to its particular facts, been doubted by high authority: *McAndrews* v. *Thatcher*, 3 Wall. 347.

The principle, however, is fully recognized and well settled. It is not applicable, however, to this case, [104] because it is evident the expenses involved were not incurred for the common benefit of the boat and the cargo. Expenses incurred for a separate interest, the other interests not being involved in the danger, are chargeable to that interest. Here it is evident the cargo was taken off to lighten the boat, and not because the cargo was in danger.

No common danger existing, no common benefit to be secured, the lower court properly disregarded the question of general average: *Fireman's Ins. Co.* v. *Fitzhugh*, 4 B. Mon. 161.

This singular state of case is, however, presented. The appellee, Pence, incurred but about thirty-three hundred dollars of expense in saving and repairing the boat. He has, upon the ground of a total constructive loss, recovered a judgment for four thousand dollars, the full amount of the insurance, and has also kept the boat. If the verdict is to stand he is made more than whole, and yet the contract of insurance is one of indemnity merely.

It is true there may be an abandonment of the vessel, and a claim for the full amount of insurance upon the ground of a total constructive loss. The fact that it does not ultimately prove an absolute or total loss will not defeat the claim.

The right to abandon as for a total loss depends upon the probabilities, when the right is exercised, that it will prove such, and is not affected by the fact that the vessel is subsequently saved and the damage less than was expected.

It was held in the *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, that the abandonment of a vessel for a total loss, made in good faith, when it was in reasonable [105] probability impracticable to recover and repair it, and when the damage from the perils insured against amounted in like probability to more than fifty per cent of the value, was a valid one within the terms of a policy providing that there should be no abandonment as for a total loss, unless the injury sustained was equivalent to fifty per cent of the agreed value of the vessel, although by a change of circumstances it afterward

became practicable to float off the vessel, and the loss was thereby reduced to less than fifty per cent of that value.

If, in all probability, the expenditures that must be incurred to deliver the vessel from peril will be more than half her value, and if her peril be such that a considerate owner, if uninsured, would not attempt to save her because of such great expense, then the abandonment would be valid.

Says Kent: "The right of abandonment does not depend upon the certainty, but on the high probability, of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities, and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense": 3 Kent's Commentaries, 321.

An abandonment is, however, a surrender of the right of property. It is a giving up, a total desertion of claim. It includes not only the intention to abandon, but a relinquishment of all right to the property. There must be a concurrence of the intention and the actual relinquishment of all rights, so that the insurer may [106] appropriate the property. When abandoned it is as much his as if it had been the subject of a bill of sale.

It is true, it is said, it is effected by an unconditional notice to the underwriter, given within a reasonable time after the assured knows of the loss; but even if the latter gives such notice, and yet all the time continues to hold, claim, use, and control the property as his own, and in denial of the rights of the insurer, it would not be a valid abandonment. In such a case there would, notwithstanding the notice, be no cession to the underwriter of the ownership. We do not mean, of course, that the owner must take the property and deliver it to the insurer. This would be impracticable. But, although the owner may give notice of an intention to abandon, yet if he all the time continues to hold against the right of the insurer and to claim and use the property as his own, then there is, in fact, no abandonment, and the owner can only recover upon the policy what may in fact be his loss.

It is said if the conduct of the appellee in continuing to use and claim the boat operated as a waiver of the abandonment, yet it is not pleaded.

Conceding that he gave the notice, as is claimed, of the intention to abandon, yet he, in fact, never did so. There never was any abandonment.

It cannot reasonably be said that by the mere notice the rights of the parties became fixed when the appellant continued to use and claim the boat. This would sacrifice substance to form. If there had been a valid abandonment those rights would have become fixed, but the appellant's own testimony shows there was none. The appellee never held the boat at any time for the appellant. [107] It results that the case is one of partial and not total loss. The criterion of any recovery is the sum which the appellant necessarily paid out and expended for the relief and repair of his boat; and the only error of the lower court consisted in instructing the jury upon the hypothesis of an abandonment for a constructive total loss.

Wherefore, the judgment is reversed and cause remanded for another trial in conformity to this opinion.

MARINE INSURANCE—LIABILITY FOR LOSS CAUSED BY MASTER'S NEGLIGENCE.—An insurer is liable for extraordinary perils only, unless by express stipulation, and not for such as proceed from the negligence, unskillfulness, or misconduct of the master and crew: *Natchez Ins. Co.* v. *Stanton*, 2 Smedes & M. 340; 41 Am. Dec. 592. The underwriters are not liable for the loss of a stranded vessel, when the loss could have been avoided by care and diligence on the part of the owner or his agent: *McDowell* v. *General etc. Ins. Co.*, 7 La. Ann. 684; 56 Am. Dec. 619, and note.

MARINE INSURANCE—ABANDONMENT.—A ship damaged more than one-half her value may be abandoned as for a total loss: *Deblois* v. *Ocean Ins. Co.*, 16 Pick. 303; 28 Am. Dec. 245; *Abbott* v. *Broome*, 1 Caines, 292; 2 Am. Dec. 197; *Hyde* v. *Louisiana etc. Ins. Co.*, 2 Martin, N. S., 410; 14 Am. Dec. 196; *Orrok* v. *Commonwealth Ins. Co.*, 12 Pick. 456; 32 Am. Dec. 271; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. 191; 33 Am. Dec. 727. See, also, the note to *Peirce* v. *Ocean Ins. Co.*, 29 Am. Dec. 576.

MARINE INSURANCE—GENERAL AVERAGE.—RULE OF: See the notes to *Reynolds* v. *Ocean Ins. Co.*, 33 Am. Dec. 732; *Merchants' etc. Ins. Co.* v. *Shilito*, 86 Am. Dec. 500, and *Walker* v. *United States Ins. Co.*, 14 Am. Dec. 613.

MARINE INSURANCE—ABANDONMENT—HOW EFFECTED.—Abandonment must be positive, and must in express terms or by necessary implication impart an actual present relinquishment of the interest or subject matter to which the abandonment applies, and must truly state the grounds upon which it was made and a total loss claimed: *Peirce* v. *Ocean Ins. Co.*, 18 Pick. 33; 29 Am. Dec. 567; *Bosley* v. *Chesapeake Ins. Co.*, 3 Gill & J. 450; 22 Am. Dec. 337, and note.

ROTHSCHILD *v.* KOHN BROTHERS AND COMPANY.

[93 KENTUCKY, 107.]

INSOLVENCY—SECRET TRUST FOR DEBTOR—RIGHTS OF CREDITORS—ESTOPPEL.—Acceptance by creditors of their share of their debtor's assets in an action brought by his assignee in insolvency to settle the trust does not estop them from subjecting to their claims goods sold by such assignee to one who purchased them for and with the money of the debtor, and it makes no difference that the goods sought to be subjected to their claims are not the identical ones obtained from the assignee.

SUBROGATION—SURETY IN CLAIMANT'S BOND.—When goods held under a fraudulent trust for a debtor are levied on by his creditors as his property, and released from execution under a claimant's bond given by the fraudulent trustee, the fact that the latter is held liable on the bond does not give him nor his surety any right to the goods by way of subrogation for indemnity as against other creditors of the fraudulent debtor who have intervened and acquired the right to look to the property for the satisfaction of their claims.

LIS PENDENS.—The commencement of an action and the suing out of summons by a creditor to subject to his claim property of his debtor, held under a secret trust by another, creates an equitable *lis pendens*, if the property is specifically described in the petition, and one who purchases or takes a mortgage on such property from the fraudulent trustee pending the action is a *lis pendens* purchaser.

LIS PENDENS.—Under the Kentucky statute an equitable *lis pendens* is acquired in a suit to subject specific property to the payment of a debt, by filing a petition and suing out summons.

Sweeny, Ellis, and Sweeney, for the appellants.

G. W. Williams and Son, for the appellees.

[109] HOLT, C. J. June 29, 1882, M. Levy made an assignment for the benefit of his creditors to one Baer. The assigned property consisted of a stock of merchandise.

After a small portion of them had been sold at retail by the assignee the balance were, as is claimed, pretendingly purchased by Jacob Goldnamer as if for himself, but in fact for Levy, and paid for by the latter. They [110] are brothers-in-law. Levy thenceforth controlled and carried on the business, but in the name of Goldnamer, who was merchandising about a hundred miles distant.

In April, 1883, J. M. Robinson & Co. and C. H. Bliss, having judgments against Levy and returns of *nulla bona*, instituted actions assailing the assignment and purchase by Goldnamer as fraudulent, and averring that the purchase was merely colorable as to Goldnamer, and in fact made for Levy, he furnishing the money to pay for the goods.

They sued out attachments, under which a portion of them were seized, and finally sold under a decree directed to be entered by the superior court, it holding that the purchase was fraudulent upon the part of Goldnamer, and made in fact for Levy.

The goods so seized did not, however, sell for enough to pay the debts of these two attaching creditors, and the actions remained pending upon the docket.

Goldnamer brought an action for a new trial upon the ground that he had discovered those creditors had, in a suit by the assignee to settle the trust, received their *pro rata* of the trust estate, including what had been paid for the goods bought in his name, and this fact was attempted to be relied on as an estoppel of the claim that the assignment or purchase in Goldnamer's name was fraudulent.

A new trial was, however, refused, and, upon appeal, the judgment was affirmed by the superior court.

January 12, 1888, Kohn Brothers & Co., and other creditors of Levy, having obtained judgments and returns of "no property," sued to subject the goods in the store, which was still being conducted by him, but in Goldnamer's [111] name, claiming that the assignment and purchase by the latter, in 1882, were fraudulent; really for Levy's benefit; that the latter had, in fact, paid for them, and that all the stock then on hand, in truth, belonged to him. The summons was served on Levy January 14, 1888, but not on Goldnamer until January 19, 1888. No attachment was sued out

In November previous Wald & Co. had brought a similar suit upon a return of "no property." They sued out an attachment, but nothing was done under it. Levy and Goldnamer were, however, served with summons within a day or two after the filing of the petition.

They, as well as one other creditor, also sued out executions upon judgments in their favor, which were levied upon the goods.

Goldnamer, with Joseph Rothschild as his surety, executed claimant bonds for them.

Notices were issued in January, but not executed until February, 1888, of motions upon these bonds, and at this stage those motions and all of the suits, including those of Robinson & Co. and Bliss, were, by consent, consolidated.

January 18, 1888, Goldnamer executed a mortgage upon the goods on hand to other creditors, who, on March 10, 1888,

tendered a petition in these causes asserting the same, but it was rejected; and the court finally rendered a judgment holding the obligors in the claimant's bonds liable for the debts as to which they had been executed, and the goods on hand having been sold by a receiver, it ordered the remainder of the debts of Robinson & Co. and Bliss to be paid in full therefrom, and the balance to be distributed *pro rata* to the other plaintiffs, not [113] including the creditors who had obtained judgment upon the claimant bonds.

It would unnecessarily extend this opinion to detail the testimony in the case, or to consider whether the assignee was a party to any fraudulent purpose. It is sufficient to say that when all the circumstances proven are considered, they are convincing to an unprejudiced mind of fraud upon the part of Levy to which Goldnamer was a party, and that the superior court was right in its conclusion upon the appeal in the cases of Robinson & Co. and Bliss. Moreover, the chancellor has, in all these cases, considered the testimony, and so found, and his conclusion as to this question of fact is, in our opinion, abundantly supported by the testimony.

The fact that the plaintiffs claimed and received their *pro rata* of the fund in the hands of the assignee, in the suit by him to settle the trust, does not estop them from seeking to subject the goods now on hand, although, by reason of purchase and sale, they are not the identical ones obtained from the assignee.

It is true that in the action by the assignee to settle the trust, some of the creditors excepted to the commissioner's report upon the ground that the purchase by Goldnamer was a pretended and fraudulent one; but Goldnamer was not a party to that suit, and whether the purchase by him was merely colorable, and, in fact, for Levy's benefit, which is the issue now made, could not have been determined in that action. The fact that the plaintiffs in these proceedings shared in the distribution of the trust fund, including what was paid for the goods purchased in Goldnamer's name, does not create any estoppel, because they are proceeding upon the ground that [114] the money paid for them was that of Levy; that the goods, therefore, also belonged to him, and that they have a right, therefore, to look to both for the payment of their debts. The idea is that the goods when purchased belonged to him, and that the business which had been conducted in Goldnamer's name up to the time it was closed out by the

appointment of the receiver in these actions was in fact that of Levy, and that the goods on hand, although not the identical ones obtained from the assignee, belonged to Levy, and were therefore liable for the debts of the plaintiffs. The question is not *res judicata*.

It is, however, said that Goldnamer and his surety in the claimant's bonds have been made liable thereon, and still the goods, or the fund arising from their sale, have, by the judgment, been given to the other plaintiffs. So far as the surety is concerned, it is sufficient to say, that in such a case he can only look to his principal for indemnity. No right of subrogation to any creditor's rights exists as to him, and Goldnamer will not, under the circumstances, be heard as to what equitable right, if any, the claimant of property, where he has been made liable and has thus satisfied the debt, has to look to the property for indemnity where other creditors of the debtors have intervened, and acquired the right to look to the property for the satisfaction of their claims.

Goldnamer presents himself as a party to a fraud; and while he may now be liable for goods which have been purchased in his name to run the store, yet, as he has allowed his name to be thus used in the carrying out of the fraudulent purpose, he must rely upon Levy paying for them and saving him harmless. He cannot upon the [114] idea that if he was not the real owner of the goods, yet he at least held them in trust for Levy, be indemnified out of the proceeds, because if he can in any view be regarded as a trustee, he was a fraudulent one.

The only other question necessary to be considered is the refusal of the court to allow the mortgagees under the mortgage from Goldnamer, of January 18, 1888, to assert it. It may be said, if the goods were not his then he had no right to mortgage them. But in response to this, it can be properly said that this was a question upon which the mortgagees were entitled to be heard. If, however, the plaintiffs in these suits had, before the execution of the mortgage, acquired a *lis pendens* equitable lien upon the goods, then, as the fund realized from their sale did not satisfy the plaintiffs' claims, this question need not be considered, and the various other reasons given in argument why the petition of the mortgagees to be made parties was properly rejected need not be noticed.

The attachments originally sued out by Robinson & Co. and Bliss were exhausted by the sale of the portion of the

goods upon which they were levied. The mere bringing of a suit to subject property to a debt where the plaintiff has no specific lien will not, in the absence of any grounds authorizing the chancellor to subject it, create a *lis pendens* lien.

But where it is claimed the property has been fraudulently transferred, and it is specifically described in the petition, as it is in this instance, and the chancellor is asked to subject it, an equitable *lis pendens* lien is acquired: *Northern Bank of Kentucky* v. *Deckebach*, 83 Ky. 154.

The doctrine of *lis pendens* applies both at law and [115] in equity. But for it a court often could not execute its decrees. Alienation of the property during the pendency of the action would prevent its doing so. After a suit is begun, it would be contrary to public policy to permit one, though not a party to it, to defeat any judgment by the acquisition of the property. If allowable, litigation would be unavailing. The rule is based upon necessity, and liable to work such hardship that it would likely not be in force as to *bona fide* purchasers, but for the publicity of judicial proceedings, which affords opportunity of getting information. When, however, does this *lis pendens* begin?

Freeman on Judgments, section 195, says: "*Lis pendens*, except when some statute provides otherwise, begins from the service of the process or subpœna, and not before."

This is the common-law rule, and in the absence of any statutory provision the commencement of the *lis pendens* is in general the service of the process.

A *lis pendens* is merely, however, as the term indicates, a pending suit; and section 39 of our Civil Code provides that an action is "commenced" by the filing of the petition and the suing out of the summons.

When this is done the action is by our statute begun: *Hart* v. *Hayden*, 79 Ky. 346.

Whenever an action is "commenced," according to the statute, it is certainly pending; a party may then by diligence inform himself that the property is in litigation; and it results, that when this mortgage was executed all of the creditors, to whom the judgment gives the proceeds of the goods, had an equitable *lis pendens* lien upon them. Although the summons in the Kohn Brothers & Co. [116] suit was not executed on Goldnamer until the day after the mortgage was executed, yet the action had, according to our statute, been pending for several days. So far as notice is concerned it

did not matter to the mortgagees whether the *lis pendens* dated from the filing of the petition and the suing out of the summons, or from its service. The service upon Goldnamer gave no actual notice to them.

It is sought by a cross-appeal to charge Goldnamer with the money realized by the sale of goods while the store was being conducted by Levy, from 1882 to 1888; but the theory upon which the creditors proceed is that Levy in fact owned the store, and that he, and not Goldnamer, got the proceeds.

The judgment is affirmed upon both the original and cross-appeals.

LIS PENDENS—AT WHAT STAGE OF ACTION ARISES.—A *lis pendens* begins, where a bill is filed, from the service of summons: *Allison* v. *Drake*, 145 Ill. 500; *Gold Hunter Mining etc. Co.* v. *Holleman*, 2 Idaho, 839; *Lincoln Rapid Transit Co.* v. *Rundle*, 34 Neb. 559. At common law *lis pendens* commenced on the day the writ bore *teste*, while in chancery it did not exist until the subpœna was served: *Newman* v. *Chapman*, 2 Rand. 93; 14 Am. Dec. 766, and extended note. *Lis pendens* does not arise so as to imply notice to purchasers, until the bill has been filed and the subpœna served: *Miller* v. *Kershaw*, 1 Bail. Eq. 479; 23 Am. Dec. 183, and note; *Murray* v. *Blatchford*, 1 Wend. 583; 19 Am. Dec. 537; *Campbell's case*, 2 Bland, 209; 20 Am. Dec. 360, and note.

HITE *v.* HITE.

[93 KENTUCKY, 257.]

WILLS—CONSTRUCTION—LIFE TENANTS—INCOME.—Trustees under a will authorizing the sale of any of the estate, and directing them to invest the proceeds "so as to be safe and produce income," and to pay the income to the testator's wife and children for their lives, with remainder over, are not to treat the unproductive real estate as converted as of the time of the testator's death so as to allow the life tenants income from that time, but are to allow them the income actually realized only.

WILLS—CONSTRUCTION—EQUITABLE CONVERSION—LIFE TENANTS—INCOME. The doctrine of equitable conversion is not applied for the purpose of giving to life tenants a portion of the proceeds of sales of unproductive real estate, as income from the time of the testator's death, under a will giving trustees power to sell, and directing them to so invest the estate as to produce income when the estate is large, and as the will directs the proceeds of sales to be reinvested, it is evident that the testator did not intend income to be paid to the life tenants on account of property from which none was realized. In such case money expended from the income of the estate for taxes or improvements upon real estate which is nonproductive, should be refunded to the life tenants from the proceeds of the sale of such real estate.

LIFE TENANTS AND REMAINDERMEN—INCOME FROM STOCKS—WHO ENTITLED TO.—Corporate dividends, whether of stock or payable in money,

are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared, and as between a life tenant entitled to the income from an estate out of which such dividends are declared and the remainderman, they belong to the life tenant if a profit and declared after his tenancy has commenced, although they may result in part from profits previously earned, but if declared out of profits resulting from the sale of real estate owned by the corporation at the time of the testator's death they belong to the remainderman and not to the life tenant.

LIFE TENANTS AND REMAINDERMEN—STOCKS, TO WHOM BELONG.—A privilege given by a corporation to its stockholder to take additional stock at par when stock is worth more, is a right appurtenant to the stock, and, as such, is part of the capital of an estate, and therefore belongs to the remainderman and not to the life tenant, under a will which gives the life tenant the income from an estate of which such stock forms a part.

LIFE TENANTS AND REMAINDERMEN—STOCKS—INVESTMENT BY TRUSTEES. When trustees, under a will giving to life tenants the income of an estate with remainder over, invest the principal in stocks at above par, the cost of the stocks is to be charged to such principal without deduction from the income of the life tenant on account of the excess above the par value.

LIFE TENANTS AND REMAINDERMEN—APPORTIONMENT OF EXPENSES OF ESTATE.—Under a will giving the income from the estate to life tenants with remainder over, the income should bear the annual expense of its collection and disbursement, but the expense of conversion and reinvestment of the principal being for the benefit of both remainderman and life tenant should be apportioned between them.

Shackleford Miller, for the appellants.

Humphrey and Davie, and W. Lindsay, for the appellees.

[260] HOLT, C. J. The questions in this case arise between tenants for life and remaindermen:

The will of W. C. Hite provides: "1. I nominate and appoint my friend, Thomas L. Barret, [261] and my son, William W. Hite, my executors and trustees, and devise and bequeath to them my entire estate, real, personal, and mixed, in possession, remainder, or reversion, and wherever situated, for the purposes and upon the trusts herein indicated. I give them full power and authority to sell, convey, and reconvey, in their discretion, any real estate which I may own, or any which they may purchase for my estate. I give them full power and authority to sell, transfer, and deliver any or all of my stocks, bonds, and securities of every kind, and full power and authority to invest and reinvest, from time to time, the proceeds of such sales in other stocks, bonds, and securities and improved real estate, whether situated in this state or elsewhere.

"Whenever sales are made by my said trustees the title shall pass, and the purchaser need not look to the application of the purchase money. It is my will, and I give to my said trustees all power and authority which may be necessary and proper to carry out the purpose and trusts as herein indicated; and I do not desire that they be required to give bond with security, either as executors or trustees; nor do I wish them to file any inventory of my estate in the county court.

"The estate devised and bequeathed to my said trustees is for the use and benefit of my wife, Mary E. Hite, and my children and their descendants, and my devisees as indicated in this my will.

"8. After the payment of my funeral expenses and just debts, and the payment of and provision for the legacies and bequests as directed in this will, I desire and direct my trustees to manage, control, invest, and dispose of the balance of my estate, of every kind and description, [sic] including, after my wife's death, that part of my estate which has been set aside for her annuity, in their discretion, so as to be safe, and produce income.

"My trustees shall, ten (10) years after my death, if my trust estate in their hands be sufficient for that purpose, pay over to each of my children ten thousand ($10,000) dollars, and if any of my children be dead, leaving children then alive, they shall be paid their parent's part; but should any of my children be dead without issue living, that child's share remains as part of the trust fund.

"My trustees shall, between the time of my death and the payment of said sums of ten thousand dollars, pay over the net income arising from said general trust estate to my wife, Mary E. Hite, and my children, Mary E. Winston, Nannie T. Hite, William W. Hite, Louis Hite, and Allen R. Hite, one-sixth to each.

"If there should be any of my estate remaining after the payment of said sums directed to be paid my children, I desire it to be kept together by my trustees and made productive of income.

"This estate shall remain undivided, and continue in trust during the lives of my wife and children, and during the life of the longest liver of them. At the death of the longest liver the trust shall cease, and the trust estate be divided and distributed among the descendants of my children, according

to the provisions of the statute of descents and distributions as then existing in the state of Kentucky.

"The net income arising from said trust estate shall be divided annually between my wife and children, one-sixth to each."

[263] It is contended for the life tenants that under these conditions the unproductive real estate of the testator should be treated as converted as of the day of his death; and that as the trustees sold it from time to time, the entire purchase money realized should not be treated as a part of the principal of the trust fund, but such a sum only as with six per cent interest per annum from the time of his death would amount to the purchase money; and that the difference between the two amounts should go to the life tenant. In other words, that, under the doctrine of equitable conversion, such a portion of the purchase money as would equal this interest must be regarded as income, and not as capital. The lower court, erroneously as we think, accepted this view.

The intention of the testator must govern. He undoubtedly intended that the trustees should so change and invest the estate as to make all of it productive of income. This is evident from the eighth clause of the will, which directs them to invest and dispose of it "so as to be safe and produce income." He must have known, however, that this could not probably be done at once without sacrifice. This doubtless led to his giving them a broad discretion in the matter; and while he provided that the life tenants should have any net income from his estate, yet he no doubt had in view income actually realized. The estate was large. Much of it at his death was already productive, and it cannot well be supposed he expected a part of the principal would be given to the life tenant to compensate for the delay which he knew must occur before the remainder of it could be made so.

The doctrine of equitable conversion is at best an artificial, arbitrary one. It will not be applied, unless it is [264] made the duty of the trustee to sell. Conceding, as we think is true, that this is so in this instance, and that the discretion given relates only to the time when it shall be done, yet in view of the character of the entire estate, and the will itself, which says the proceeds of the sales are to be reinvested, it is clear to us the testator did not intend income to be paid to the life tenant on account of property from which none was realized.

If it be said, if this be so, then the trustees could by delay enrich the remainderman at the expense of the life tenant; yet the testator, as is evident from the will, did not intend the condition of the latter to be better than his own; and if he had lived, no income might have come to him for years from this portion of his estate, or from some of his stocks; and nothing should be allowed the life tenant save actual income arising from the testator's estate, because this was his evident intention and expectation. If, however, any taxes upon, or sums by way of improving, the unproductive real estate have been paid out of the income of the other estate the same should be allowed the life tenant out of the sales of the unproductive estate. The testator never intended the life tenant to thus protect and add to the value of the real estate from which he was receiving no benefit. The fair presumption is that the testator intended such a reimbursement.

Since the testator's death certain stock dividends, based upon earnings and profits, have been declared upon some of the stocks. It is claimed by the remaindermen that they belong to the principal of the estate, while the life tenants assert they are entitled to them as income. The question is beset with difficulties. It is urged by the former that the mere declaration as "a stock dividend" [265] by the company is conclusive in their favor; that being stock it must be treated as a part of the capital, and that the conclusion of the company to turn all their profits into capital is a matter in its discretion, and conclusive upon the courts.

As between the company and the shareholder the action of the directors in determining whether the earnings shall be capitalized in stock dividends or paid out in cash is conclusive; but when once declared, although in the form of stock, it is the province of the law to determine whether they belong to the *corpus* of an estate and are to benefit the remainderman, or whether they shall go to the life tenant as income. It is the rule as settled by the current of authority that dividends, whether of stock or payable in money, are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared. If, for instance, the life tenancy has begun when a cash dividend is declared it belongs to the life tenant, although it may result in part from profits previously earned. It goes to him irrespective of the time when it was earned. No inquiry will in such a case be made as to what portion of the profit upon which the divi-

dend was based was earned before or after the death of the testator for the purpose of apportioning it between the tenant for life and the remainderman.

The difficulty attending such an inquiry, the impossibility of attaining accuracy, and of ascertaining the many sources from which the profit has been derived, are the reasons for this rule; but it does not also follow that the declaration of the company, as to the character of the dividends, determines its legal *status* and to whom it shall belong. It is the law which says that the time when it [266] is declared shall be deemed the date of its accrual, and so it is for the law, when it is once declared, to determine its ownership.

There is great conflict of decision, however, upon this point. The English rule seems to be that the tenant for life is entitled to cash dividends only. This was declared in the early case of *Brander* v. *Brander*, 4 Ves. 801, but in a country where entails and perpetuities are favored. It has, however, been followed by many of the highest courts of this country, but the reasoning of their opinions is not satisfactory to us. They are, perhaps, largely the result of regard for former decision; but the question is of first impression in this state. Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it, whether paid in stock or money. A stock dividend proper is the issue of new shares, paid for by the transfer of a sum equal to their par value from the profit and loss account to that representing capital stock; and really a corporation has no right to declare a dividend, either in cash or stock, except from its earnings; and a singular state of case—it seems to us an unreasonable one—is presented, if the company, although it rests with it whether it will declare a dividend, can bind the courts as to the proper ownership of it, and by the mode of payment substitute its will for that of the testator, and favor the life tenant or the remainderman, as it may desire. It cannot in reason be considered that [267] the testator contemplated such a result. The law regards substance, and not form, and such a rule might result not only in a violation of the testator's intention, but it would give the power to the corporation to

beggar the life tenants, who, in this case, are the wife and children of the testator, for the benefit of the remaindermen, who may perhaps be unknown to the testator, being unborn when the will was executed. We are unwilling to adopt a rule which, to us, seems so arbitrary and devoid of reason and justice.

If the dividend be in fact a profit, although declared in stock, it should be held to be income. It has been so held in Pennsylvania and many other states, and we think it the correct rule: *Earp's Appeal*, 28 Pa. St. 368; Cook's Law of Stocks, sec. 554. The lower court adopted this view, but it should not be held to include a dividend like that declared by the Birmingham Rolling Mill Company. It was not declared out of earnings, but out of profits made by the sale of a piece of real estate that the company owned at the decedent's death. His interest in it was, at the time of his death, a part of the *corpus* of his estate, and it is properly capital and not income.

It was also error to hold that the privilege, given by a corporation to its stockholder to take additional stock at par when the stock is worth more, belongs to the life tenant. This right stands upon a different footing from the claim to a stock dividend. It is a mere incident of the old stock. It is a right appurtenant to it, and as such, is a part of the capital. It cannot be fairly considered as income, but is inherent in the shares of stock in their creation. While the value of the right must depend essentially upon the success of the business of the company see this does not alter the nature of the right, and the stock is properly a part of the *corpus* of the estate of the owner. This incident of the stock was, at the death of the testator, a part of his estate, and the option merely operated to increase or broaden the capital or change the manner of the investment. It gave the right to a larger interest in the capacity of the company to make profits, but not to the income itself. The life tenant should not, however, be required to restore the stocks gotten under these options, but their value should be ascertained as of the time when the options were given, and the life tenant required to account for the profit as a part of the capital of the estate: *Matter of Kernochan*, 104 N. Y. 618; *Brinley* v. *Grou*, 50 Conn. 73; 47 Am. Rep. 618.

The lower court, in adjusting the conflicting rights of the parties, adopted what is called the "sinking fund" theory;

that is, it held that where the trustees purchased stocks by way of reinvestment, at more than their par value, they must retain out of the income from them and add to the principal of the estate a sum equal to the excess above the par value; else, as was said, at the maturity of the bonds or stocks the principal would be lessened, as they would then only be worth their par value. This was error, and the appellees question the correctness of the ruling by a cross-appeal.

It is urged that this is necessary to preserve the principal of the estate intact, and do substantial justice between the life tenant and the remainderman.

The objects of investment were, however, twofold, to wit: safety, and the production of income. The investment must be a safe one in order to preserve the capital, and must also be an income-producing one to benefit the [269] life tenant. Investments in stocks above par are not only more productive, but more secure; and both qualities must be kept in view. The bonds might be bought at a premium and then sold at a still higher one; and then, if enough is also taken from the income and added to the principal to balance the excess above par at which they are purchased, the remainderman will be doubly benefited.

Some investments will increase, while some will diminish, in value. Bonds might be purchased under par, but their face value collected at maturity, and all would be added to the capital. All things considered, it seems to us the safe rule is to let those matters balance themselves, as they are likely to do in time.

The testator no doubt contemplated the matter in this light, and we think intended that, where an investment was made, the cost of it was to be charged to the principal without any deduction from the income of the life tenant. The costs appear to have been fairly apportioned. The annual expenses of collecting and disbursing the income should come out of it; but the expenses of conversion and reinvestment were for the benefit of both the remainderman and the life tenant, and it was proper to apportion them.

The judgment is reversed upon both the original and cross-appeal, and cause remanded for further proceedings consistent with this opinion.

ESTATES—LIFE TENANT AND REMAINDERMAN—DIVIDENDS ON STOCKS TO WHOM BELONG.—Under a bequest of stock in trust, the income going to a life tenant, with remainder over, dividends, whether in cash or certifi-

cates of indebtedness, and although infrequent and unusually large, go to the life tenant: *Millen* v. *Guerrard*, 67 Ga. 284; 44 Am. Rep. 720. To the same effect, see *Vinton's Appeal*, 99 Pa. St. 434; 44 Am. Rep. 116. See, also, *Cobb* v. *Fant*, 36 S. C. 1, and the extended notes to *Allen* v. *DeGroodt*, 14 Am. St. Rep. 633, and *Gibbons* v. *Mahon*, 54 Am. Rep. 264, where this question is fully discussed.

ESTATES—LIFE TENANT OR REMAINDERMAN—NEW SHARES OF STOCK.—New shares of corporate capital stock, constructed out of surplus earnings, are not income, and do not go to the life tenant: *Petition of Brown*, 14 R. I. 371; 51 Am. Rep. 397, and note; *Gibbons* v. *Mason*, 4 Mackey, 130; 54 Am. Rep. 262, and extended note. An increase of capital of a corporation should be kept for the remainderman, and an increase of income should be paid to the tenant for life: *Minot* v. *Paine*, 99 Mass. 101; 96 Am. Dec. 705, and note.

DAVIS *v.* JENKINS.

[98 KENTUCKY, 353.]

MARRIED WOMEN—MORTGAGES—WAIVER OF HOMESTEAD AND DOWER.—A mortgage signed and acknowledged by the wife of a mortgagor, containing apt words waiving her right of homestead and dower, is binding upon her although her name does not appear in the granting clause.

MARRIED WOMEN—CONCLUSIVENESS OF JUDGMENT AGAINST.—A judgment by default rendered against a married woman and her husband decreeing a sale of their homestead under mortgage foreclosure cannot at her instance be set aside at a subsequent term of the court on the ground that the mortgage or its acknowledgment by the wife was void. Such judgment after the expiration of the term is *res judicata*, even as to such married woman.

ACKNOWLEDGMENTS—CONCLUSIVENESS.—An officer's certificate of acknowledgment of a mortgage is conclusive as to the matters therein contained except for fraud in the party benefited, or mistake by the officer, or in direct proceedings against the officer or his sureties.

J. W. Bush, and Sprigg and Vanmeter, for the appellant.

S. H. Bush, for the appellee.

354 BENNETT, J. In 1883 S. H. Jenkins, husband of the appellee, L. A. Jenkins, and the said appellee, L. A. Jenkins, executed a mortgage on a house and lot, the property of S. H. Jenkins, situated in West Point, Hardin county, Kentucky, to secure the payment of borrowed money. Thereafter, S. H. Jenkins, in contemplation of insolvency, made an assignment for the benefit of creditors. The assignee instituted suit in the Hardin circuit court to have the estate settled and distributed among the creditors. Emily Davis, as creditor and mortgagee, was made defendant to that action. She instituted a cross-action against S. H. Jenkins and the appellee,

L. A. Jenkins, by which she sought to have her mortgage lien on the house and lot enforced. Summons on the cross-petition was duly executed on S. H. and L. A. Jenkins, and judgment by default was thereafter rendered on the cross-petition against S. H. and L. A. Jenkins for said mortgage debt, and foreclosing the mortgage lien on the house and lot to satisfy said debt. More than a year thereafter, and after the term of court at which the judgment foreclosing the mortgage was rendered, the appellee by petition made known to the court that her husband, S. H. Jenkins, had been, since the execution of the mortgage, adjudged a lunatic, and was then confined in the lunatic asylum. She also alleged that her name did not appear in the granting clause of the mortgage, and that her husband had procured her signature thereto and acknowledgment [356] by duress; hence she and her infant children were entitled to a homestead in said house and lot. The court, upon final hearing of that part of the case, set aside the judgment theretofore rendered foreclosing the mortgage, and adjudged that L. A. Jenkins, by reason of the matters set up by her, had not relinquished her homestead in said house and lot, and consequently allowed her a homestead therein. From that judgment Emily Davis appeals.

It is true that L. A. Jenkins' name does not appear in the clause granting the title to said house and lot. She had no title thereto, but she did have an inchoate right to homestead and dower in said house and lot, which she could not be deprived of except by her own act exercised in the manner pointed out by the statute. The statute upon these subjects provides that the right to a homestead shall not be waived nor dower relinquished, except by a written conveyance thereof signed by the husband and wife and acknowledged by them and recorded, etc. Now, the title to the real estate was in the husband, S. H. Jenkins, and the wife, L. A. Jenkins, owned no interest therein whatever; she was only entitled to an inchoate right to homestead and dower therein, which she could waive and relinquish by deed signed by herself and husband for that purpose, and duly acknowledged and recorded, etc. Now, if she joins in that part of the body of the deed conveying the homestead and dower, by apt words to convey said interests, that is a compliance with the statute upon that subject. The mortgage, in reference to the waiver of homestead and dower by Mrs. L. A. Jenkins, reads: "And Mrs. L. A. Jenkins, wife of S. H. Jenkins, hereby

857 waives right of homestead and dower in and to the real estate mentioned in this mortgage." S. H. Jenkins and she signed and acknowledged the mortgage, which was recorded. The rule above laid down was complied with. As said judgment was rendered by default, subjecting the house and lot, which included the homestead, to the payment of the mortgage debt, and about a year thereafter the court allowed L. A. Jenkins to set aside the judgment and assert and obtain a homestead in the same. This court, in the case of *Harpending* v. *Wylie*, 13 Bush, 158, decided that a judgment by default rendered against a married woman, in conjunction with her husband, at one term of court decreeing the sale of their homestead, could not, at the instance of the married woman, be set aside at a subsequent term of court, except by proper proceedings to vacate or modify the judgment; that the judgment rendered at the former term, after that term had expired, was *res judicata* even as to a married woman: See, also, *Honaker* v. *Cecil*, 84 Ky. 203, and *Hill* v. *Lancaster*, 88 Ky. 343. According to these cases the appellee, L. A. Jenkins, had no right, upon the state of case presented by her, to have the judgment subjecting the homestead set aside at a subsequent term of court. Besides, section 17, chapter 81, of the General Statutes, provides that "unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or a mistake on the part of the officer."

858 The statute *supra* relates to the certificate of the officer who is required to make it, and except for the fraud in the party benefited, or a mistake in the officer, the certificate is conclusive as to the matters therein contained, unless in a direct proceeding against the officer or his sureties: See *Pribble* v. *Hall*, 13 Bush, 61.

It is not alleged, nor is there any proof, that there was fraud in the mortgagees in obtaining certificate of acknowledgment, nor of a mistake by the officer. Now the certificate of the clerk being conclusive, that L. A. Jenkins freely and voluntarily executed and acknowledged the mortgage, and there being no fraud or notice of the alleged fraud by S. H. Jenkins on the part of the mortgagees, and they being otherwise inno-

cent purchasers for value, they are not affected by the alleged fraud; and the mortgage must be held valid and as passing the appellee's homestead: See *Pribble* v. *Hall*, 13 Bush, 66.

The judgment is reversed, and cause remanded, with directions to proceed consistently with this opinion.

ACKNOWLEDGMENTS AS EVIDENCE.—The certificate of a magistrate of the acknowledgment of a deed or mortgage is a judicial act, and conclusive in the absence of fraud or duress as to the facts therein stated: *Heeter* v. *Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Kerr* v. *Russell*, 69 Ill. 666; 18 Am. Rep. 634. *Contra: Dodge* v. *Hollinshead*, 6 Minn. 25; 80 Am. Dec. 433, and note. A certificate of acknowledgment is of no value as to a fact stated in it if the law did not intrust the officer to certify to this fact: *Draper* v. *Bryson*, 17 Mo. 71; 57 Am. Dec. 257, and note.

HOMESTEAD.—WAIVER BY MORTGAGE: See the note to *Moran* v. *Clark*, 8 Am. St. Rep. 88.

JAMES *v.* MCMINIMY.

[93 KENTUCKY, 471.]

NUISANCES.—BLASTING WITH GUNPOWDER in a city or town near enough to the property of others to do injury is a nuisance, unless proper precautions are taken to prevent injury to such property, or to the persons of others ignorantly coming within its reach.

MASTER AND SERVANT—INDEPENDENT CONTRACTORS.—If an independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages for the injury.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—If a contractee employs an independent contractor to do work for his benefit, which, in the ordinary mode of doing it, he as a prudent man has reason to believe is a nuisance, he is liable for injuries resulting from it to third persons; but when he has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out that during the progress of the work it is necessary to create a nuisance in order to do it, the contractee is not liable for injuries to third persons resulting from the nuisance before he has notice of its existence. Upon receiving such notice he must take such reasonably prompt and efficient means as are in his power to suppress the nuisance to relieve himself from liability for subsequent injuries to third persons.

Bell and Bell, for the appellants.

Poston and Jacobs, for the appellees.

472 BENNETT, J. The appellees, Ellen and Thomas McMinimy, employed Isaac Winkersham a competent and skill-

ful person in that line, to build them a house on their lot lying in the town of Harrodsburg, Kentucky. Said employment included the building of a cellar of certain dimensions under the house, and the excavation of the earth for that purpose. The bill of exceptions says the evidence adduced before the jury conduced to show that it was necessary, in order to do the excavation in the ordinary mode of doing that kind of work, to blast with gunpowder. The proof also shows that the appellant's intestate, a citizen not engaged in helping to do the blasting, was hurt by one of the blasts.

This action seeks to recover damages from the appellees McMinimys and Wickersham, caused by the said injury. The right to recover damages from the McMinimys was resisted upon the grounds:

1. That Wickersham was an independent contractor, and the work that he was to perform did not necessarily create a nuisance; consequently, they were not liable in damages for the injury.

[473] 2. That the injury to the appellant's intestate was the result of his contributory negligence.

It is well settled that blasting with gunpowder in a city or town, near enough to the property of others to do injury, is a nuisance, unless proper precautions are taken to prevent injury to the property of others within its reach, or to the persons of others ignorantly coming within its reach.

The contract clearly shows that Wickersham was an independent contractor, and not the servant of the McMinimys.

Now it is well settled that where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury. On the other hand, where the contractee employs the contractor to do work for his benefit, which, in the ordinary mode of doing it, he, as a prudent man, has a reason to believe is a nuisance, he is liable for any injuries that may result from it to third persons. The reason of the contractee's liability is that the contractee is liable for injuries resulting from his own unlawful act, and he cannot protect himself from such liability by employing others, under the name of independent contractors, to do the unlawful act. But where he, as a prudent man, has no reason to believe that the act contracted to be done is a

nuisance, but is in itself lawful, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third [474] persons resulting from the nuisance before he had notice of its existence. But in such case, upon receiving notice it would be his duty to take such reasonably prompt and efficient means as are in his power to suppress the nuisance, else he will be responsible for injuries to third persons resulting from the nuisance after notice: See Wood on Master and Servant, 598–612; *Robinson* v. *Webb*, 11 Bush, 480.

The case should have been submitted to the jury in accordance with the foregoing principles. Also the question of contributory negligence should have been submitted to the jury.

The judgment is reversed and case remanded, etc.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—A contractor, and not his employer, is answerable for injuries resulting from the doing of acts which may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons are likely to result, provided it was the duty of the contractor under the contract to exercise such care: *Engel* v. *Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692, and note; *Hackett* v. *Western Union Tel. Co.*, 80 Wis. 187; *Atlanta etc. R. R. Co.* v. *Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 231, and note. Where one contracts with another exercising an independent calling to do work for him according to the contractor's own methods, and not subject to the former's control, except as to the results obtained, the former is not liable for the wrongful acts of the contractor or his servants: *Long* v. *Moon*, 107 Mo. 334. But if the carrying out of a contract with an independent contractor is necessarily injurious to third persons, the doctrine of *respondeat superior* applies: *Williams* v. *Fresno Canal etc. Co.*, 96 Cal. 14; 31 Am. St. Rep. 172, and note. See, further, the extended note to *Stone* v. *Cheshire R. R. Corp.*, 51 Am. Dec. 200.

NEGLIGENCE.—INJURY CAUSED BY BLASTING: See *Blackwell* v. *Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786, and note.

WATKINS *v.* SNADON.

[93 KENTUCKY, 501.]

REMAINDERS, LIFE TENANT AND REMAINDERMAN—WHO ENTITLED TO POSSESSION.—When a general devise of money, stocks, or bonds is made to one for life with remainder over, the life tenant is not entitled to possession; but the executor retains it, paying to the life tenant the income, unless from the whole will it appears that it was the intention of the testator that the life tenant should have possession of the thing devised, and in the latter event the intention of the testator must control.

WILLS—CONSTRUCTION.—In construing a will the language employed in a single sentence is not to control as against the evident purpose and intent as shown by the whole instrument, but effect must be given to such intent.

WILLS—REMAINDERS—POSSESSION AS BETWEEN LIFE TENANT AND REMAINDERMAN.—When from all the terms of a will it appears that a testator in making a general devise of money, stocks, or bonds to a tenant for life with remainder over, intended that the life tenant should have possession of the thing devised effect must be given to such purpose and intent.

W. Lindsay, and Petrie and Forgy, for the appellants.

Bowden and Bowden, W. F. Browder, B. T. Perkins, Jr., and H. J. Stites, for the appellees.

502 HOLT, C. J. William Watkins died testate in May, 1890, his will having been executed in October, 1883.

He left no widow, but two children and six grandchildren, the latter being the children of his two daughters that survived him. He left a large estate, consisting of various kinds of property. A son-in-law, a grandson, and one of the daughters were nominated by the will as his personal representatives, and they are the appellants. They brought this action for its construction. It gives to his two daughters for their separate use for life, certain real estate and county bonds, with remainder to their children; and the power is given the daughters, or in the event of their death the grandchildren, to dispose of the property if sufficient cause arises, the proceeds to be reinvested by them in real estate.

After making one other specific bequest he gave the entire remainder of his estate for life to the six grandchildren, share and share alike, for their separate use, with remainder to their children respectively.

It is evident the paramount purpose of the testator was to provide for his two daughters and his grandchildren. The will expressly so states.

It further provides, if any one of the grandchildren should die without issue, his or her portion shall go to the survivors; also, as money may be collected on notes or bonds, for its reinvestment in certain ways, and gives the power, if it becomes necessary, to sell any of the real [504] estate and invest the proceeds in like property, but does not expressly say by whom this is to be done.

It expressly declares that the profits arising from the estate given to his daughters for life shall be subject to their absolute disposal and control; and that this shall be the case as to the grandchildren as to the estate given them for life, after paying the expenses of their education, and when they become of age. Three of the grandchildren are married women, and three are infants. Mention is not made in the will of any one as trustee. In the portion of it relative to the devise to the grandchildren, and just after speaking of them, it says: "Such is the difficulty of loaning money, safely, that I hereby authorize the parties, if they, in their wisdom, think it would be best and safest to invest the notes above named and also the bonds as above in good real estate."

It also provides: "I request and require that my hereinafter named executor or executors and executrix make no charge for distributing the legacies herein made to my daughters and grandchildren, because of the little labor attending it; I hope to make the distribution myself."

The principal contention, and the only one we think it necessary to consider, is, are the grandchildren not only entitled to the profits of the estate given them for life, but also to the possession and control of it, those not of age being represented by guardian? The lower court held they were, and denied the right of the executors to hold and control it during the lives of the life tenants. In this view we concur.

It is urged, however, that the estate devised to them for life is a large one; that it is largely composed of [505] money and notes; that by giving the control of one-sixth of it to each of the life tenants it will likely be lost to the remainderman, and that the testator cannot be supposed to have intended such a risk; that the conduct of the estate in this way will place the rights of the remaindermen in continual peril, and that such management, with safety to the rights of all the interested parties, is impracticable.

It is true that generally, where there is a bequest of money, or stocks, or bonds, the life tenant is not entitled to the pos-

session. The executor retains it, the life tenant getting the income. But this and all other rules of construction must be disregarded if the testator's intention plainly appears from the entire will. If it shows that he intended the life tenant to have the possession, that he was willing to trust him with it, then this intention must of course control. It determines the rights of the parties, and rules of construction are to be resorted to only when the testator has not made known his purpose. It is to be gathered from the entire will. The language employed in a single sentence is not to control as against an evident purpose shown by the whole instrument. Effect is to be given to the general intent, and this we think is shown throughout the will.

In the first place it is clear he intended the daughters to have the control and possession of the property given to them for life, and a portion of it consisted of bonds. It is true it was a specific bequest, but yet it shows he was willing to risk the life tenants. The support of his daughters and his grandchildren was his chief concern. His great grandchildren were not. And it is evident he expected and intended a speedy distribution of his estate. [506] This would be impossible if the executors are to hold it for the remaindermen. A half a century would likely elapse before the duty would end, and this would certainly be in the face of the fact that the testator declared, "I hope to make the distribution myself."

The will in the first place gives the property to the grandchildren for life. It seems to speak of them as "the parties" who are to make investments of the proceeds of the notes and bonds in real estate. It cannot be doubted that if the personal representatives are to hold the property during the lives of the grandchildren, and as one may die deliver his or her portion to his or her children, that the care and control of the estate would involve much care, responsibility and labor; and yet the testator has declared that they shall "make no charge for distributing the legacies herein made to my daughters and grandchildren because of the little labor attending it."

It seems to us that it is plain, when the entire will is considered, that he was willing and intended to risk the life takers with the possession of the property. If it be said that this is improbable, because their interest is antagonistic to that of the remaindermen, yet the interest of the former was his chief concern, and he doubtless knew that in case of bad

faith upon their part, or that of the guardians of the infant devisees, in the control and conduct of the property, the courts would, upon proper application, interfere for the protection of the remaindermen.

He was willing to make the life tenants, for whose benefit the devise was mainly intended, in effect trustees for the remaindermen without the giving of security. [507] He undoubtedly would not have required it if he had, as he hoped to do, made the distribution himself.

Judgment affirmed.

WILLS—CONSTRUCTION.—The intention of the testator must control in the interpretation of a will, and, in order to ascertain what that intention is, the whole will and all its parts must be considered: *Ducker* v. *Burnham*, 146 Ill. 9; 37 Am. St. Rep. 135, and note; *L'Etourneau* v. *Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310.

ESTATES—LIFE TENANT AND REMAINDERMAN.—WHO ENTITLED TO POSSESSION OF PERSONAL PROPERTY: See the notes to *Allen* v. *De Groodt*, 14 Am. St. Rep. 623; *German* v. *German*, 67 Am. Dec. 453, and *Braswell* v. *Morehead*, 57 Am. Dec. 587.

CHEMICAL NATIONAL BANK *v.* WAGNER.

[93 KENTUCKY, 525.]

NEGOTIABLE INSTRUMENTS—RIGHTS OF HOLDERS.—Innocent holders of negotiable paper for value are not prejudiced by any equities existing between the antecedent parties, of which they had neither notice nor knowledge of such facts as should put them on inquiry. This rule does not apply to the authority to make the paper, and as to that they purchase at their peril.

NEGOTIABLE PAPER OF CORPORATION—RIGHTS OF HOLDER.—A purchaser of negotiable paper issued by the agent of a corporation in its name buys at his peril as to the agent's authority, but if such agent in issuing the paper acts within the scope of his authority, though he acts wrongfully, of which the purchaser had no notice, nor notice of facts sufficient to put him on inquiry, he is protected as an innocent purchaser.

NEGOTIABLE PAPER OF CORPORATION—AUTHORITY OF AGENT OR OFFICER TO ISSUE.—An officer in a corporation whose authority is confined to taking charge of the finances of the company, signing its checks, receiving and accounting for its money coming to his hands, and to acting as a business committee in the absence of the president and vice-president, has no authority to issue notes in the name of the corporation so as to bind it, in the absence of proof of the absence of such president and vice-president at the time of the issue of the notes or of special authority given by the corporation to such officer to issue them.

CORPORATIONS—LIABILITY FOR ACTS OF AGENT.—An agent of a corporation may bind it, if he acts under immediate instructions from some superior agent authorized to thus act, or from the board of directors,

CORPORATIONS—POWER OF OFFICERS.—The president of a corporation has no power to authorize its treasurer to issue notes in its name for his personal benefit.

NEGOTIABLE INSTRUMENTS OF CORPORATION—ISSUE OF BY AGENT—RIGHTS OF HOLDER.—Notes which show upon their face that they are issued in the name of a corporation by its agent for his own benefit are *prima facie* void at the instance of the corporation, and holders cannot recover on them unless they can show that they were issued by such agent under proper authority from the corporation.

W. Worthington, W. B. Burnet, and J. S. Ducker, for the appellants.

J. C. Wright, C. J. Helm, and C. L. Raison, for the appellees.

[528] BENNETT, J. The Swift Iron and Steel Works Company is a corporation, created by the legislature of this state in January, 1871. At the time of the transactions in controversy in this case, E. L. Harper was president of the company and J. H. Mathews was its treasurer; there were also a vice-president and board of directors of said company. The powers of each are set forth in the company's by-laws, as follows: "SEC. 3. All contracts and obligations binding the corporation may be signed by the president or vice-president." "SEC. 5. The treasurer shall have charge of the finances of the company, and shall sign all checks and receive and account for all moneys and property coming into his hands." "SEC. 8. There shall be a business committee consisting of the president and vice-president, who shall have full power to transact the business of the company, under such restrictions as the board of directors may devise from time to time." This by-law was amended so as to authorize either member of the business committee to act in the absence of the other, and in the absence of both "the treasurer shall have power to act as such committee."

J. H. Mathews, in April and May, 1887, drew six promissory notes in the name of the Swift Iron and Steel Works for twenty-five thousand dollars each, due respectively in four months, and signed by him as treasurer, and made payable to himself individually, which he then indorsed individually and delivered to E. L. Harper, who was then vice-president of the Fidelity National Bank of Cincinnati. Said Harper, as vice-president of the Fidelity National Bank of Cincinnati, indorsed said notes to the appellants—two to the Chemical National [529] Bank and four to the First National Bank—to

collaterally secure loans of money to the Fidelity National Bank. Not long thereafter the Fidelity National Bank and the Swift Iron and Steel Works, becoming insolvent, made an assignment for the equal benefit of creditors. The appellants filed these collaterals in the suit by the assignee of the Swift Iron and Steel Works to have its affairs settled and assets distributed, for the purpose of obtaining their *pro rata* thereon. The lower court rejected their claim upon the ground that J. H. Mathews, as treasurer, had no authority to issue them payable to himself individually; hence, they were void at the instance of the company. The appellants contend that said Mathews did have authority to issue said notes; but if he did not the notes were negotiable paper, and they were purchasers thereof for value, having no notice of any infirmity in them.

It is conceded, for the sake of the argument, that the notes, dated at Cincinnati, Ohio, indorsed and payable to order at a bank in New York, were, by the laws of Ohio and New York, negotiable paper, and that the appellants, as innocent holders thereof for value, are not prejudiced by any equities existing between the antecedent parties, of which they had no notice, or notice of such facts as should put them upon inquiry as to the existence of the antecedent equities. But the rule protecting innocent purchasers of negotiable paper against antecedent equities does not apply to the authority to make the paper. The holder of the paper purchases it at his peril in reference to the authority to make it. *Caveat emptor* applies to him in full force in reference to the authority to make the paper. For instance, if the person making the paper professes to act as agent for another, the person purchasing it must look out for the agent's authority to make the paper; the purchaser purchases at his peril as to the authority of the agent. The same rule applies to an agent of a corporation issuing paper in the name of the corporation; the purchaser of the paper buys it at his peril as to the agent's authority to issue it. The only exception is, if the agent of the corporation, in issuing the paper, acts within the scope of his authority, but in the particular he acted wrongfully, of which the purchaser for value had no notice, nor of such facts as should put him upon inquiry as to the authority in the particular case, then the innocent purchaser would be protected upon the ground that the corporation, whose agent acted within the scope of his authority and with the consent of the corporation, should suffer by the

wrongful act of the agent acting within said scope, rather than an innocent purchaser.

So the question is, Did Mr. Mathews have authority to issue these notes? We think not, for the following reasons: By the fifth by-law, *supra*, his authority is confined to taking charge of the finances of the company, signing its checks, receiving and accounting for its money coming to his hands; and, by an amendment, to act as a business committee in the absence of the president and vice-president. Now, by the fifth by-law, he had no authority to issue said notes, and there is no pretense that he issued them as a committee. But suppose he did, had he the authority to do so? We think not; because, in the first place, if he could issue them at all he could do so only in case of discharging the business of the company in the absence of the president and vice-president, and it is not [531] shown that they were absent, which absence is a condition precedent to such authority; and, in the second place, the business committee—including the president, vice-president, and treasurer—were confined to transacting the legitimate business of the company, subject to the direction of the board of directors, and it is not shown that they conferred authority upon the committee to issue these notes or any notes of the kind, which would be beyond the scope of their authority as a business committee. Nor is it shown that they, or either of them, ever exercised such authority, with or without the authority of the board of directors, save the treasurer's action in this instance, which action was an attempt by the treasurer to bind his principal, as its agent, to pay him as principal the sums that the notes called for. To allow the agent to thus bind his principal, without authority from him to do so, would at once destroy good faith on the part of the agent, and become the most glaring fraud; to prevent which, and to protect the principal, the law declares such transactions void at his instance. The principal may give authority to his agent to thus bind him, and an agent in like manner may bind the corporation he represents, if he acts under the "immediate instructions from some other superior agent" authorized to thus act, or "from the board of directors": See 1 Morawetz on Corporations, sec. 527. It does not appear that the board of directors authorized J. H. Mathews to thus act, and if Mr. Harper authorized him to thus issue said notes, it was an attempt to bind the company for his personal benefit in connection with another corpora-

tion, not within the scope of his authority, and was a fraud upon his principal.

Now, the notes bear upon their face the conclusive evidence [532] of the fact that they were issued by Mr. Mathews, as agent, to himself as principal, which was notice of itself to the appellants that the notes were void at the instance of the company, which destroyed their immunity as innocent purchasers, and consequently they could not recover thereon unless they could show that the company, by its superior officer, authorized so to do, or its board of directors, with like authority, authorized Mr. Mathews to thus issue the notes; because the appellants being, *prima facie*, not innocent purchasers, the notes being void upon their face, they, in order to entitle them to recover from the company, must show that they were issued rightfully and properly by the company's agent, which they have failed to do.

The judgment is affirmed.

There is no brief on file for the appellees.

CORPORATIONS—NEGOTIABLE INSTRUMENTS OF, ISSUED BY AGENTS—RIGHTS OF HOLDERS.—This question will be found fully discussed in *Merchants' Nat. Bank* v. *Citizens' Gaslight Co.*, 159 Mass. 505; 38 Am. St. Rep. 453, and note; *Duggan* v. *Pacific Boom Co.*, 6 Wash. 593; 36 Am. St. Rep. 182, and note, and the extended note to *Simpson* v. *Garland*, 39 Am. Rep. 299; also the note to *Credit Co.* v. *Howe Machine Co.*, 1 Am. St. Rep. 136.

NEGOTIABLE INSTRUMENTS—RIGHTS OF INNOCENT HOLDERS.—One who purchases negotiable paper before its maturity for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, or which ought to excite suspicion in the mind of a prudent man, is a *bona fide* holder and takes the paper free of defenses on the part of the maker: *Rubles* v. *Davis*, 33 Neb. 779; 29 Am. St. Rep. 509, and note; *Mechanics' etc. Bank* v. *Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853. See the extended note to *Bedell* v. *Herring*, 11 Am. St. Rep. 310.

OHIO VALLEY RAILWAY COMPANY *v.* WATSON.

[93 KENTUCKY, 654.]

RAILROADS—LIABILITY FOR DEFECTIVE TRACK.—A railway is not an insurer against all accidents, but when an injury results from a defect in the track that, by the exercise of proper care, could have been provided against by the company, it is liable.

RAILROADS—EVIDENCE OF CONDITION OF TRACK.—When, in an action against a railway company to recover for injury to a passenger by the derailment of a car alleged to have resulted from rotten ties at the place of the accident, the evidence is conflicting as to the condition of the track at that place, proof on the part of the plaintiff as to the defective condition of the track on account of rotten ties near to, as well as at, the place of the accident, is admissible, especially when the defendant has first made that an issue by introducing evidence.

RAILROADS—RISKS ASSUMED BY PASSENGER ON FREIGHT TRAIN.—One who takes passage on a freight train assumes the additional risks, if any, in excess of the risks incident to a passage on the same road on a passenger train.

RAILROADS.—RISKS ASSUMED BY PASSENGER ON FREIGHT TRAIN are no greater than those assumed by a passenger on a regular passenger train, so far as the condition of the cross-ties or of the condition of the road for the safety of trains moving upon it is involved.

RAILROADS—DEGREE OF CARE DUE TO FREIGHT PASSENGER.—The highest degree of care and diligence is required of a railway company for the safety of passengers on freight as well as passenger trains.

Yeaman and Lockett, J. F. Clay, and H. Hughes, for the appellant.

J. Y. Brown and E. W. Hines, for the appellee.

656 PRYOR, J. In March of the year 1890 the plaintiff's intestate, James A. Watson, wanted passage on a special freight train belonging to the Ohio Valley Railway Company, from the town of Morganfield to Corydon, Kentucky. Those in charge of the train refused first to let him travel upon it; but, being informed by him that his father was dying, and that he was anxious to be with him before his death, the superintendent of the road at that point consented he should go, and, upon his paying the regular passenger fare, he started on his journey. Before reaching Corydon the caboose in which he was riding left the track and was dragged several hundred feet over the cross-ties, and finally thrown off the track upon Watson, killing him instantly.

This action was instituted by his personal representative, alleging that Watson lost his life by the gross and willful neglect of the company. There are no particular acts of negligence alleged in the petition, but an answer filed deny-

ing any neglect, and averring that the car was thrown from the track by inevitable casualty, and without fault on the part of the defendant; and, further, when the intestate saw the danger, he negligently leaped, or attempted to leap, from the car, when the circumstances transpiring were not such as to impress an ordinarily prudent man with the necessity of attempting to leave the car, and that his own neglect cost him his life. A reply was filed negativing the averments of the answer, and the cause heard by a jury that returned a verdict for six thousand two hundred and fifty dollars in damages.

[657] On the trial of the cause the railroad company claimed the burden of proof, and was adjudged entitled to open and close the argument, to which the plaintiff excepted, but as a recovery was had, the question raised below is not here for decision.

The railroad company, having claimed the burden, proceeded with its testimony in relation to the condition of the railway track at the place where the accident occurred, and a number of witnesses familiar with the track and its condition testified that the cross-ties were sound and the road in excellent repair. Engineers, roadmaster, as well as others not connected with the road, spoke of the road as being in excellent repair, both at and near the place where the derailment took place. Also, that the cars were moving at the ordinary rate of speed for a freight train when the accident happened. The defective condition of the railway track and its ties, and the great speed of the train, seem, from the testimony, to have constituted the neglect causing the death of Watson, and the testimony was confined to those acts of negligence. When the defense closed the case the plaintiff's testimony showed, and that by a number of witnesses, the bad condition of the track, the decayed appearance of the cross-ties, and its apparent unsafe condition. This unsafe or defective condition was not only made to appear at the place of the accident, but for several hundred feet on each side of it, beginning at the point where the derailing first occurred. It was objected below, and made a ground of reversal in this court, that the court erred in permitting the plaintiff to prove the defective condition of the road at any other point than that of the accident; and while we are satisfied proof of its condition in close proximity [658] to the place of the injury would have been competent, after showing the decayed ties

at the place, still the appellant opened the door to this character of testimony by first proving the condition of the road, not only at the place of the injury, but along the entire track in and about the place of the injury.

A railway is not an insurer against all accidents, but where the injury results from a defect that, by the exercise of proper care, could have been provided against by the company, it then becomes liable. The jury were so told in an instruction that could not have been misunderstood; but where the injury results from rotten ties, and the contention is that they are sound, we are not prepared to say, the testimony being conflicting, that proof as to its defective condition on account of rotten ties near to, as well as at, the place of the accident, would be incompetent. It is true that a rotten tie one hundred feet distant from where the train was derailed could not have caused the accident; but when one side, the plaintiff, shows that the ties were rotten at the place, and the defendant that they were sound, the defective or sound condition of the ties within one hundred feet on each side of the place of the accident, or for a further distance, would to some extent corroborate the statements of the one side or the other.

In *Vicksburg etc. R. R. Co.* v. *Putnam*, 118 U. S. 545, the supreme court, through Mr. Justice Gray, said: "There being evidence tending to show that the accident was caused by a worn-out rail, it was within the discretion of the court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long [sic] been bad. . . . Such evidence had some tendency to prove both that a worn-out rail was the cause of the accident and the defendant had neglected to repair the defect."

A similar question was raised in the case of *Sidekum* v. *Wabash etc. Ry. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549, in which the supreme court held: "The condition of the roadbed at the place, or in the immediate vicinity, of the accident, may be shown."

The opinion of this court in the case of *Louisville etc. R. R. Co.* v. *Fox*, 11 Bush, 495, is not opposed to the admission of this character of testimony, as it was there held: "The portions of the track to which the evidence related were too remote from the scene of the accident to have contributed to it." If, therefore, the appellee had offered evidence conducing to show that parts of the road a mile away, or a greater dis-

tance, had defective ties upon it, the court should have excluded it from the jury; but where you bring the condition of the ties in as close proximity to the place of the injury as was done in this case, the testimony was competent for the reasons already stated.

The court told the jury "that in taking passage on a freight train the intestate took upon himself the additional risk, if any, in excess of the risks incident to a passage on the same road in a passenger train." This, we think, is good law, and it would not have been proper to have told the jury that the risk of losing his life or of being injured was greater on the one than on the other. The jury knew that the comfort in traveling was not the same, and, from the instruction, the passenger, when being transported, assumed the risk necessarily incident to the [sic] mode of travel he had adopted; and while derailment is more liable to happen on heavy freight trains than on passenger trains, the passenger assumes no greater risk as to the condition of the cross-ties, or the condition of the road for the safety of trains moving upon it.

As said by the supreme court in *Indianapolis etc. R. R. Co.* v. *Horst*, 93 U. S. 291: "Life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car." The highest degree of care and diligence is required for the safety of the passenger on either the one train or the other, and proper vigilance means the exercise of such care as, when exercised by prudent men in the management and supervision of the road and the train, would prevent any such accidents.

The speed with which the train was moving was, if true, dangerous to those upon it, and while the preponderance of the evidence on the issue as to the momentum of travel may be with the appellant, still, there was sufficient proof on the part of the plaintiff to justify the court in instructing the jury on that branch of the case. We might add that the weight of the testimony on both issues was with the defendant, and still there was much evidence for the plaintiff on the issue as to the defective condition of the rails, and of such a character as must end the litigation when the law has been properly given. And that the instructions were as favorable for the defense as could well have been given cannot be doubted. The judgment below is therefore affirmed.

RAILROADS—LIABILITY FOR PASSENGERS ON FREIGHT TRAINS.—A passenger riding on a freight train by direction and permission of the conductor, and without notice that he is riding contrary to the rules of the company, is entitled to the same rights as if he were riding on a passenger train: *McGee* v. *Missouri Pac. Ry. Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note; *McVeety* v. *St. Paul etc. Ry. Co.*, 45 Minn. 268; 22 Am. St. Rep. 728, and note; *New York etc. Ry. Co.* v. *Doane*, 115 Ind. 435; 7 Am. St. Rep. 451, and note. A person taking passage on a freight train, with knowledge of the risks incidental thereto, is bound to be more careful in guarding against injury than he would be in traveling upon ordinary passenger trains: *Wallace* v. *Western North Carolina R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note. See, further, the notes to *Rosenbaum* v. *St. Paul etc. R. R. Co.*, 8 Am. St. Rep. 656, and *Central R. R.* v. *Smith*, 2 Am. St. Rep. 39.

RAILROADS—LIABILITY FOR DEFECTIVE ROADWAY.—A railroad company, in the carriage of passengers, is bound to the most exact care and diligence in the structure and care of its track: *McElroy* v. *Nashua etc. R. R. Corp.*, 4 Cush. 400; 50 Am. Dec. 794; *Pennsylvania R. R. Co.* v. *Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323. A carrier of passengers by rail is bound to furnish reasonably safe roadbed, tracks, and cars as the utmost human skill and diligence can provide: *Furnish* v. *Missouri Pac. Ry. Co.*, 102 Mo. 438; 22 Am. St. Rep. 781, and note; *Chicago etc. R. R. Co.* v. *Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483. If a passenger is injured by a derailment of a car, the presumption is that such derailment resulted from the negligence of the carrier: *Alabama etc. R. R. Co.* v. *Hill*, 93 Ala. 514; 30 Am. St. Rep. 65, and note; *Montgomery etc. Ry. Co.* v. *Mallette*, 92 Ala. 209. See, also, the exhaustive note to *Ingalls* v. *Bills*, 43 Am. Dec. 355.

CASES

IN THE

SUPREME COURT

OF

LOUISIANA.

STATE NATIONAL BANK *v.* FLATHERS.

[45 LOUISIANA ANNUAL, 75.]

NEGOTIABLE INSTRUMENTS—MORTGAGE NOTES—RIGHTS OF HOLDER.—One who as security for negotiable notes has executed a mortgage, which he had the full right and capacity to make, on property belonging to himself, by an act suggesting on its face no defect, duly recorded and importing confession of judgment, in favor, not solely of the mortgagee, but of any future holder of the note, cannot impair its value and binding effect in the hands of a subsequent holder, by pleading secret equities created by his own fault, negligence, or imprudence, of which such holder has no notice and no means of information.

MORTGAGES BY NATIONAL BANKS—FORECLOSURE—INJUNCTION.—Although national banks are prohibited by statute from loaning money on real estate and taking a mortgage as security, yet a mortgagee cannot enjoin such bank from enforcing its loan by foreclosure of its mortgage. The penalty provided by the statute can be invoked by the United States alone.

Louque and McGloin, for the appellant.

James McConnell, Horace E. Upton, and Browne and Choate, for the appellee.

77 FENNER, J. Plaintiff is the *bona fide* holder, by transfer before maturity, of negotiable notes executed by defendant, payable to his own order, and by him indorsed and secured by a mortgage of concurrent date, consented to by defendant, in favor of the mortgagee and "any future holder or holders of said notes," by act importing confession of judgment.

Plaintiff proceeded to enforce his mortgage by executory process, and was met by an injunction taken out by defend-

ant, on the grounds: 1. That he executed the notes and mortgage in favor of the mortgagee, G. A. Lanaux, who was his commission merchant, on the latter's representation that the accounts between them showed defendant to be a debtor in the sum of six thousand dollars, and that five thousand dollars more would be necessary to furnish him with future necessary advances; but that he subsequently discovered that said representations were false, and that, in truth, the said mortgagee was largely indebted to him; 2. That since the execution of the notes he has shipped to the mortgagee a larger amount of produce than the sum of the notes; 3. That the plaintiff, by the national banking law, is prohibited to hold mortgage securities, and cannot be heard in court when seeking to enforce the same.

To the petition for injunction the bank filed an exception of no cause of action, based on the grounds: 1. That the alleged equities between defendant and Lanaux could not avail against the bank as a *bona fide* transferee of the note and mortgage before maturity; 2. That the defendant was incompetent to urge the objection based on the national banking law, the right to do so being reserved exclusively to the United States. From a judgment maintaining the exceptions the defendant appeals.

1. The defendant admits that the negotiability of the notes bears the equities alleged by him as against the notes and his personal liability [78] thereon, but he contends that the mortgage is not negotiable, and that, as against its enforcement, they furnish a valid defense. It is true that mortgages are not negotiable. This court has repeatedly so held, and has never, to our knowledge, held to the contrary: *Schmidt* v. *Frey*, 8 Rob. (La.) 435; *Bowman* v. *McKleroy*, 14 La. Ann. 596; *Bouligny* v. *Fortier*, 17 La. Ann. 125; *Doll* v. *Rizotti*, 20 La. Ann. 265; 96 Am. Dec. 399; *Garner* v. *Gay*, 26 La. Ann. 376; *Morris* v. *White*, 28 La. Ann. 855; *Jennings* v. *Vickers*, 31 La. Ann. 684.

But this court has very deliberately held that a *bona fide* holder of a negotiable note acquired before maturity, secured by a mortgage duly recorded, which has been executed by one having lawful authority to make it, and bearing on its face nothing to impeach its validity, cannot be defeated in his mortgage rights by secret equities between the original parties, existing before or arising after its execution, of which neither the act nor the public records afforded any notice, and

of which he had no actual notice, at least when such equities are opposed by the original mortgagor or in his right. This was clearly and emphatically held in the case of *Carpenter* v. *Allen*, 16 La. Ann. 435, and the decision was not based on the principle of negotiability of the mortgage, but on the different principles, viz: 1. Because when one of two innocent parties must suffer, the law throws the loss on him by whose negligence or fault the damage is occasioned; 2. Because a mortgage is a real right created only by observance of the forms of law, required to be recorded like sales of real estate, such registry being required especially for the protection of third persons, who are entitled to look to it for protection, and, without actual notice, are not required to look beyond it.

We consider that these principles were substantially recognized in the following cases: *Gardner* v. *Maxwell*, 27 La. Ann. 562; *Taylor* v. *Bowles*, 28 La. Ann. 294; *Davis* v. *Greve*, 32 La. Ann. 420; *Butler* v. *Slocomb*, 33 La. Ann. 170; 39 Am. Rep. 265.

We have noticed, but do not deem it necessary to answer, the criticism of the applicability of these cases, because in a more recent case we have distinctly and very considerately affirmed *Carpenter* v. *Allen*, 16 La. Ann. 435, and have used the following language, the force of which impresses our minds as strongly now as then: "The conclusion thus reached is supported by law, justice, and equity, and tends to give security in transactions of the kind considered in this case. Holding [79] differently would be to authorize debtors, ostensibly such by their own acts or culpable omissions, to take advantage of their own laches in order to prejudice and entrap innocent parties becoming *bona fide* creditors, and to desecrate the sanctity of justice by closing the fatal door upon them": *Schepp* v. *Smith* 35 La. Ann. 1.

A like rule is enforced by the supreme court of the United States and is recognized in our sister states: *Carpenter* v. *Longan*, 16 Wall. 273; *Sawyer* v. *Prickett*, 19 Wall. 166; 1 Daniel on Negotiable Instruments, secs. 834, 834 *a*.

We have critically examined the cases relied on by defendant and find that, when properly analyzed, they do not necessarily contravene the principle stated. Thus in *Schmidt* v. *Frey*, 8 Rob. (La.) 440, the mortgage contested was given on property not belonging to the mortgagor, as appeared from

the act itself. In *Bowman* v. *McKleroy*, 14 La. Ann. 596, the equities were not opposed by the mortgagor but by a prior mortgage creditor. In *Doll* v. *Rizotti*, 20 La. Ann. 265, 96 Am. Dec. 399, the mortgage had been canceled and erased from the record before transferred. In *Garner* v. *Gay*, 26 La. Ann. 376, the act of mortgage showed on its face a contract in contravention of law. In *Morris* v. *White*, 28 La. Ann. 855, the property mortgaged did not belong to the mortgagor. In *Bouligny* v. *Fortier*, 17 La. Ann. 125, the mortgage had been consented by a married woman and was held to be without effect as in contravention of law. The general *dicta* of these cases must be restricted to the cases in which they are made.

No case is cited at all parallel in facts to those relied on in this opinion, in which their principles have been impugned. Our opinion rests upon no assertion of the negotiability of mortgages, but upon other principles of law and equity which forbid a man, who, as a security for negotiable notes, has executed a mortgage which he had the full right and capacity to make, on property belonging to himself, by an act suggesting on its face no defect, duly recorded and importing confession of judgment, in favor not solely of the mortgagee but of any future holder of the note, to impair its binding force and effect by pleading secret equities created by his own fault, negligence, or imprudence, and of which the subsequent holder of [so] the notes had no notice and no means of information. When cases arise in which the above elements or some of them are missing, we will determine them according to their particular facts.

2. The other ground of injunction, based on the prohibition of the national banking law, is insufficient in law, because negatived by repeated decisions of the supreme court of the United States, which, while conceding that the law does, by clear implication, prohibit national banks to make loans on real estate, hold, nevertheless, that the risk of ouster and dissolution was the only penalty contemplated by Congress for violating the prohibition, which penalty could be invoked by the United States alone, and the bank was not disabled from enforcing such loans by judicial process at the plea of the debtor: *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439.

Judgment affirmed.

MORTGAGES BY NATIONAL BANKS.—A national bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined: *Mathews* v. *Skinker*, 62 Mo. 329; 21 Am. Rep. 425; *Fowler* v. *Scully*, 72 Pa. St. 456; 13 Am. Rep. 699. A national bank has a right to take a chattel mortgage for the purpose of securing a previously contracted debt, and to enforce the same: *Spafford* v. *First Nat. Bank*, 37 Iowa, 181; 18 Am. Rep. 6. National banks have authority to take assignments of notes and mortgages upon real estate to secure the payment of loans made to the mortgagees: *First Nat. Bank* v. *Andrews*, 7 Wash. 261; 38 Am. St. Rep. 885.

NEGOTIABLE INSTRUMENTS—RIGHTS OF HOLDERS.—Innocent holders of negotiable paper for value are not prejudiced by any equities existing between the antecedent parties of which they had neither notice nor knowledge of such facts as should put them on inquiry: *Chemical Nat. Bank* v. *Wagner*, 93 Ky. 525; *ante*, p. 206, and note.

HOLLINGSWORTH v. THOMPSON.

[45 LOUISIANA ANNUAL, 222.]

STATUTES—PROOF OF ENACTMENT OF.—Whenever a question arises in a court of law as to the existence of a statute, or of the time when it took effect, or of its precise terms, the judge who is called upon to decide it has a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question.

STATUTES—ENACTMENT—PRESUMPTION.—When the constitution does not require the legislative journals to affirmatively show that a particular thing, necessary to the validity of the legislative action, was done, mere silence does not invalidate. In such case it is presumed that the legislature observed their obligation and did not pass the bill without sufficient proof that proper notice was given.

STATUTES—ENACTMENT—VALIDITY—BURDEN OF PROOF.—The unconstitutionality of an act enrolled, authenticated by the signature of the presiding officers of the legislature, and approved and signed by the governor, must be affirmatively and clearly shown before the court is authorized to treat it as void, on the ground that it was not passed in accordance with the rules of parliamentary law prescribed by the constitution.

STATUTES—ENACTMENT—PRESUMPTIONS.—From considerations of public policy, and because of the respect due the action of a co-ordinate department of the government, courts supply the omissions of journal clerks by presumptions as to the regularity of the proceedings of the state legislature.

STATUTES—ENACTMENT—PROOF OF.—Although an enrolled bill is not conclusive proof of the valid enactment of a statute, yet the court may look beyond it to the legislative journals, and they may supply, by presumption, every thing necessary to its validity, except when the legislative journal affirmatively shows a violation of the constitution.

Land and Land, and Alexander and Blanchard, for the appellants.

Bell and Randolph, for the appellee.

[224] WATKINS, J. The object of this suit, and the prayer of the plaintiff's petition is that the tax collector of the parish of Bossier be restrained and perpetually enjoined from collecting from them "the ten mill tax, the acreage tax, and the tax on cotton, levied for the year 1892" by the commissioners of the Bossier levee district, under and in alleged conformity to the provisions of act 89 of 1892, and that it be adjudged and decreed that said act "is not a law or statute of the state of Louisiana," and that the levy of said taxes is illegal, unconstitutional, and void.

It is further alleged and prayed that, if it is ascertained and decided that said act was passed and approved in pursuance of the forms prescribed and required by the constitution and laws of the state, said levy of taxes should be decreed null and void, because it is violative of the state and federal constitutions.

The grounds on which the foregoing relief is demanded are particularized and stated at length, and circumstantially, in the plaintiff's petition, to be, that said act 89 of 1892—it being an act to create the Bossier levee district of the state of Louisiana—was published and promulgated as a law of this state, whereas it is a fact that said act was never passed or enacted by the general assembly of the state according to requirements of the constitution and parliamentary law, for the reason that there was introduced and passed in the house of representatives a bill with the same title as that of said act 89 of 1892, which was thereafter sent to the senate, and concurred in with certain amendments, five in number. That the said bill, with its amendments, was thereupon returned to the house of representatives for its concurrence in said senate amendments. That among said amendments was one—it being the fifth or last in regular order of adoption—purporting that there shall be no compensation or salary allowed to any levee commissioner for services rendered as such other than actual expenses, to be ascertained and [225] allowed by the board; and that the house of representatives, upon considering and passing upon the said senate amendments, concurred in the four preceding amendments by a yea and nay vote, as required by the constitution, but

"that said fifth amendment was not called up, read, or voted on in said house and was not concurred in by said house, nor acted on in any manner by either house from and after its adoption by the senate, as hereinbefore set forth," as required by article 38 of the constitution.

That the journal of the house of representatives does not show any concurrence by the house in said senate amendment No. 5, and that for the want of said concurrence said bill failed to become a law or enactment of the general assembly, and was on that account improperly and unlawfully signed and promulgated as a law.

Petitioners represent that the governor of the state appointed, under the aforesaid act, levee commissioners, who convened, organized, and levied the taxes complained of as illegal, on the ground that the legislative act is illegal and unconstitutional for the reasons and causes we have enumerated; and, further, because, if otherwise valid, it is void, because it conflicts with the constitutions of the state and the United States, in that: 1. It authorizes a tax of ten (10) mills to be levied upon all property within said levee district subject to taxation; and 2. The levy of a forced contribution of five (5) cents an acre on each and every acre of land within said district that is alluvial; and further, because, in the matter of said assessments, the said law contains no provision for notice to the taxpayer, and affords him no opportunity to be heard on the question of the listing and valuation of his property before any officer, board, or court; but, on the contrary, makes the tax assessor an arbitrary judge as to what lands are subject to taxation, and what are exempt, and as to what persons shall be assessed and the valuation thereof —thus depriving petitioners of their property without "due process of law," in violation of the constitution of the United States, and depriving them of "the right of testing the correctness of their assessments before the courts of justice" within the intendment of the provisions of article 203 of the constitution of the state.

Defendant's answer admits the levy, assessment, and proceedings having been inaugurated for the collection of the tax as well as the forced contribution complained of, but it avers the legality and constitutionality of the act, and alleges that same was regularly passed [226] and approved in accordance with forms of law and the requirements of the constitution.

It distinctly and particularly alleges that senate amendment No. 5 was concurred in by the house of representatives, and that such concurrence is shown by the journals of the senate and house of representatives.

"He further avers that if the court should find that the house journal does not particularize the said amendment, as it may appear in the purported printed journals, that the failure to particularize is an omission and mistake and error of the printer or minute clerk of the house, and that the true record and journal of the house and the engrossed bill and indorsements thereon show that the fifth senate amendment, as well as all the other amendments, were concurred in by the house": Plaintiff's brief.

It finally denies that said act violates any article of the state or federal constitution, or that it contemplates the taking of property without due process of law.

On the trial there was judgment in favor of the defendant, and the plaintiffs have appealed.

The two propositions that are thus presented for consideration and decision are: 1. Whether act 89 of 1892 is unconstitutional, intrinsically; and 2. Whether it is constitutional extrinsically.

1. The effort is made by the plaintiffs to show by the legislative journals of the session of the general assembly of 1892 that the published and authorized statutes of that year contain an incorrect report of the law as it was actually and really enacted; and that the proof afforded by the journals discloses that the original bill, as it was adopted in the house of representatives where it originated, was amended in the senate, and that the amendments were not subsequently concurred in by the house of representatives. That it shows that unless the proposed amendments were accepted by the house of representatives, there was no concurrence of the two houses of assembly, and the unconstitutionality of the whole statute necessarily follows:

Looking into the journals we find the following pertinent facts, to wit:

227 "SENATE JOURNAL, JUNE 23D.

"House Bill No. 257.

"By Mr. Boggs:

"An act to create the Bossier levee district of the state of Louisiana.

"Reported favorably by the committee on agriculture, commerce, and levees, with the following amendments, which were read: In line 17, section 1, page 3, after the word 'dividing,' strike out the words, 'township 20 and 21 N.,' and insert in lieu thereof the words, 'the north half from the south half of township 20 N.'

"In line 26, section 1, page 3, after '21 N.,' strike out the figures '19 and 20,' and insert in lieu thereof the words, 'and the south half of township 20 N.'

"In line 1, section 2, page 5, after the word 'act,' strike out the word 'four,' and insert in lieu thereof the word 'five.'

"In line 13, section 3, page 6, after the word 'times,' add the words, 'and at such place as is most convenient.'

"Add the following at the end of section 3: 'There shall be no compensation in salary allowed to any commissioner for his service as such; provided, however, the board may allow to each commissioner the actual expenses incurred by him in attending the meetings of the board and while engaged in the performance of duties ordered by the board.'

"On motion of Mr. Stroud the amendments were adopted.

"The bill was read in full as amended.

"Mr. Stroud moved that the bill be passed to its third reading.

"The motion was agreed to. (See pp. 250, 251.)"

"JUNE 27TH.

"The bill passed the senate on a yea and nay vote, the title was read and adopted, and a motion to reconsider laid on the table. (See p. 277.)"

"HOUSE JOURNAL, JUNE 28TH.

"Senate returned, 'with amendments,' House Bill No. 257. (See p. 503.)

"House Bill No. 257.

"By Mr. Boggs:

"An act to create the Bossier levee district of the state of Louisiana was taken up with the following senate amendments:

228 "In line 17, section 1, page 3, after the word 'dividing,' strike out the words, 'township 20 and 21 N.,' and insert in lieu thereof the words, 'the north half from the south half of township 20 N.'

"In line 26, section 1, page 3, after the figures '19,' strike out '20 and 21 N.,' and insert in lieu thereof the words, 'and the south half of township 20 N.'

"In line 1, section 2, page 5, after the word 'act,' strike out the word 'four,' and insert in lieu thereof the word 'five.'

"In line 13, section 3, page 6, after the word 'times,' add the words, 'and at such places as is most convenient.'

"Mr. Boggs moved that the house do now concur in the senate amendments.

"The roll being called resulted as follows:

"Yeas

"Total, 76.

"Nays, none.

"Absent

"And the house concurred in the senate amendments.

"Mr. Boggs moved to reconsider the vote by which the senate amendments were concurred in, and on his motion the motion to reconsider was laid on the table.

"See pages 508 and 509."

From the foregoing it appears that the claim is made that the house of representatives failed to concur in what is termed the fifth amendment, which provides that "there shall be no compensation in salary allowed to any commissioner for his service as such," etc., and that on that account the statute is null and void *in toto*.

The evidences relied upon by the defendant as establishing the converse of that proposition are: 1. The presence in the authorized and published statutes of the legislative act in its entirety, inclusive of the fifth senate amendment, same being made up from the enrolled house bill; 2. By the entry in the house journal, *supra*, namely, "and the house concurred in the senate amendments," in pursuance of a preceding entry to the effect that a member "moved that the house do now concur in the senate amendments"; 3. By the further entry in the house journal of the yeas and nays taken on said motion, resulting in seventy-six (76) yeas and "nays none"; 4. By the entry in the senate journal of a communication received from the house of representatives to the 229 effect that the house had passed and asks concurrence in the bill "creating the Bossier levee district."

To the foregoing testimony no objection was urged, both parties conceding its admissibility, taken in connection, as it is, with the published statutes of the legislature; but when the defendant's counsel offered in evidence "the original engrossed house bill No. 257, with all indorsements thereon, including the original senate amendments attached thereto,"

plaintiffs' counsel objected on the ground that same was inadmissible because "the journals of the house are the best and exclusive evidence of the proceedings of said house, and [that] no other, of any kind, is admissible" for that purpose. The court ruled to receive it in evidence, and properly, in our opinion.

In *Gardner* v. *Collector*, 6 Wall. 499, the supreme court had under consideration and decided a similar question involving the legal enactment of a law of Congress, and on which they expressed this view: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the *existence* of a statute, or of the *time* when a statute took effect, or of the precise *terms* of a statute, the judges who are called upon to decide it have a right to resort to *any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question*," etc. [Italics are ours.]

This conclusion was stated as the result of an examination of authority, though it was preceded by a statement even more forcible and clear, viz: "The second proposition, that 'if the president's record is defective in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect' is still more at variance with both principle and authority," etc.

We had occasion to express a similar opinion upon a somewhat similar question in *State* v. *Secretary of State*, 43 La. Ann. 613, to wit: "Nor can we see the impropriety of the judge admitting the papers that were offered by the respondent. They were at least of a *quasi* official character, and will, evidently, aid us in determining the true character and value of the published volumes, which purport to be official journals."

230 On reason and authority we regard the engrossed house bill as a proper subject for consideration, in connection with the journals kept of legislative proceedings. It is the *res*, the very subject matter then under legislative consideration. It proves *rem ipsam*, if it proves nothing more.

Looking into the engrossed bill we find it to conform to the act as published in the statutes of the year 1892, embodying in its third section the substance of the fifth senate amendment. The indorsements thereon disclose fully all the stages of legislation through which it passed, from the time of its introduction in the house of representatives to final action thereon.

They show that the bill finally passed the house by a vote of sixty yeas and no nays. That it was adopted in the senate with amendments, and physically annexed to this engrossed bill are the senate amendments. That when the bill was returned, in its amended form, to the house, action thereupon was taken, and, in confirmation thereof, the clerk of the house made thereon this indorsement, to wit: "Received from senate with amendments. Roll called on concurrence in amendments. Yeas 76, nays 0. Concurred in." That subsequently, on the 6th of July, it was indorsed thus, to wit: "Enrolled and signed by the speaker and presiding officer of the senate, and taken to the governor for executive approval."

This evidence, collectively taken, points, in our opinion, with unerring certainty to the conclusion that the failure was of the clerical force in the house of representatives to make an accurate and complete report of the proceedings had upon the senate amendments, in journalizing them for the day, or in the preparation of the official copy thereof for publication; and not that of the house of representatives to clearly express its approval of the fifth senate amendment to the bill.

And when thus considered and construed, our conclusion must be that the house did concur in all of the senate amendments.

There is no provision of law, constitutional or statutory, which requires an amendment to a bill to be printed in the journal of either house of the general assembly, or in the state gazette, or the official journal of legislative proceedings.

In *State* v. *Secretary of State*, 43 La. Ann. 613, we quoted article 28 of the constitution, and extracts from section 10 of act 6 of 1881 [231] —the public printing act—and said: "In these extracts we have all the law applicable to the printing and publication of the proceedings of the general assembly in newspapers and journals."

The injunctions of the constitution are: 1. That "each house shall keep a journal of its proceedings and cause the same to be published immediately after the close of the session" of the general assembly; 2. And "when practicable, the minutes of each day's session shall be printed and placed in the hands of members"; 3. "The original journal shall be preserved after publication in the office of the secretary of state; but there shall be required no other record thereof": Const., art. 28.

The printing law simply declares "that within two days after the journal of each house shall have been approved the state printer shall publish the same as so approved": Act 6 of 1881, sec. 10.

With regard to amendment the constitutional requirement is that "no amendment to bills by one house shall be concurred in by the other except by a vote of the majority of the members elected thereto, taken by yeas and nays, and the names of those voting for or against recorded upon the journal thereof. And reports of committees of conference shall be adopted in either house only by a majority of the members, the vote to be taken by yeas and nays": Const., art. 38.

As announcing a different conclusion counsel for appellant cites and relies upon a paragraph they have selected from *State* v. *Secretary*, 43 La. Ann. 641, to the effect "that the failure of the secretary to enter one would have resulted just as fatally to the proposed amendment as the failure to enter the other."

It is sufficient to observe that the amendment there referred to was an amendment to the constitution, and not an amendment to a legislative bill—an entirely different matter.

This question has repeatedly passed under judicial investigation by different courts in other states of the union, and they have expressed views similar to the one we entertain.

In *Hall* v. *Steele*, 82 Ala. 562, it was assigned as an unconstitutionality of an act of the Alabama legislature that the senate journal failed to show "that the report of the committee of conference was adopted by the senate," and of it the court said: [223] "We have uniformly held that when the *constitution does not require* the journals to affirmatively show that a particular thing, necessary to the validity of the legislative action, was done *mere silence* will not invalidate; and in such case we will presume that the legislature observed their obligation, and did not pass such bill without sufficient proof that the proper notice was given. The unconstitutionality of an act enrolled, authenticated by the signatures of the presiding officers, and approved and signed by the governor, must be *affirmatively and clearly* shown before the *courts* are authorized to treat it as void, because not being passed in accordance with the rules of parliamentary law prescribed in the constitution." [Italics ours.] To the same effect are the following cases: *Walker* v. *Griffith*, 60 Ala. 361; *Clarke* v. *Jack*, 60 Ala. 271; *State* v. *Peterson*, 38 Minn. 143; *State* v. *Hast-*

ings, 24 Minn. 78; *Miller* v. *State*, 3 Ohio St. 475; *Williams* v. *State*, 6 Lea, 549; *Supervisors* v. *People*, 25 Ill. 181; *Larrison* v. *Peoria etc. R. R. Co.*, 77 Ill. 11; *Worthen* v. *Badgett*, 32 Ark. 496; *State* v. *Algood*, 87 Tenn. 163.

After making careful examination of many adjudications on the subject, we have nowhere found the rule more carefully or correctly stated than by the Arkansas court in *Glidewell* v. *Martin*, 51 Ark. 559: "From considerations of public policy," say the court, "and because of the respect due the action of a coordinate department of government, the courts long since began to supply the omissions of journal clerks by presumptions as to the regularity of the proceedings of the general assembly. This has been found most salutary, and the attitude assumed by the judiciary in this regard has gone far toward establishing and maintaining public confidence in the stability of legislative action. The courts are gravitating toward the English rule so thoroughly discussed in *Chicot County* v. *Davies*, 40 Ark. 200; for while they say that the enrolled bill is not conclusive proof of the valid enactment, and that we may look beyond it to the journals, they supply, by presumption, every thing necessary to its validity, save when the journal affirmatively shows a violation of the constitution."

In view of the fact that an amendment to a pending bill is not required, by either the constitution or the law, to be printed in the journals; and in view of the fact that the constitutional requirement [223] is that concurrence by one house in an amendment made by the other shall only be evidenced by "a vote of the majority of the members taken by yeas and nays"; the absence of an amendment or a part of one from the journal could not, with fairness or propriety, be construed as annihilating the whole statute.

In our opinion there is no question of the constitutionality of the law in this respect.

2. The act, considered extrinsically, is alleged to be unconstitutional, in that it authorizes a tax of ten (10) mills to be levied upon all property within said district, subject to taxation, for levee purposes, and the levy of a forced contribution of five (5) cents an acre on each and every acre of land within the said district that is alluvial; and, that in the matter of assessment of the property, the law contains no provision for notice to the taxpayer, and affords him no opportunity to be heard on the question of the listing and the valuation thereof before any officer, board, or court; but

on the contrary, makes the tax assessor an arbitrary judge as to what lands are subject to taxation and what are exempt, and as to what persons shall be assessed, and at what valuation property shall be assessed, thereby depriving petitioners of their property "without due process of law," in violation of the state and federal constitutions; and depriving them of "the right of testing the correctness of their assessments before the courts of justice" in violation of article 203 of the constitution of this state.

If this statement be accurate, the taxing statute is most radically defective and glaringly unconstitutional, indeed.

But an examination of the provisions of the act discloses the following governing provisions relative to the listing and valuation of the property of the levee district:

Section 1 provides "that all that portion of the alluvial lands in the parish of Bossier, embraced and situated within" prescribed limits are incorporated into a levee district.

Section 6 provides that the commissioners appointed for said levee district, "for the purpose of raising revenue to carry out the objects contemplated by the act, may levy annually, for levee purposes, a district levee tax of ten (10) mills on the dollar of its assessed valuation, and it shall be the duty of the assessor to extend the said tax upon [224] the tax rolls; and the assessor shall make, without additional compensation, separate rolls for the part of the parish included in this district, which rolls shall be deposited, etc., ... and the tax collector of the parish shall collect the said district levee tax, in the same manner as state taxes are collected," etc.

Section 7, in like manner, provides for the levy of a local assessment upon property of the levee district, and for its extension upon the tax rolls of the parish, and for its collection in like manner.

From the foregoing it clearly appears that the commissioners are empowered to make a levy of taxes upon properties that have been already listed and valued, or assessed. The rate of this levy must be, necessarily, restricted and confined to "the assessed valuation" of the property. When such levy is made then it becomes the duty of the assessor to make "separate rolls for the part of the parish included in the (levee) district." Subsequently, the tax collector of the parish proceeds in the collection of this tax as that of other

taxes. A new or independent assessment for levee purposes is not contemplated by the act. The levy to be made by the levee commissioners must be laid on the assessment already complete and finished. The duties of the commissioners in this regard are confined to the levying of the taxes: *Gaither* v. *Green*, 40 La. Ann. 362.

Had the statute made provision for an additional assessment for levee purposes, in our opinion it would have been violative of that provision of article 203 of the constitution which declares that "the valuation put upon property for the purpose of state taxation shall be taken as the proper valuation for purposes of local taxation in every subdivision of the state."

The duties of levee commissioners in this regard are, under the terms of the statute, exclusively confined to the levying of district levy taxes upon alluvial lands of the levee district which are subject to taxation for levee purposes. They have nothing to do with their valuation. Nor has the assessor. Nor is the aid of the parish board of reviewers brought into requisition. Nor was there any occasion for the assistance of either. They had already, and completely, performed their duties in reference to the parish assessment, and there was no additional service required, or necessary to the consummation of the levy of taxes for levee purposes.

235 Under this view of the law, it appears to be manifest that the only question of doubt or difficulty that could arise is one of fact, and that is the liability *vel non* of the property for levee taxes, as alluvial land. That question is not one of assessment, but is altogether separate and distinct from assessment proceedings, and not concluded by the decision of the board of reviewers. Of course the taxpayer's right to test the liability of his property for the payment of the levee tax on the ground that it was not alluvial would be recognized, independently of the determination of the levee commissioners.

In any view that can be taken of the statute in question, it is our opinion that it is constitutional.

Judgment affirmed.

STATUTES—PROOF OF ENACTMENT.—This question is thoroughly discussed in the monographic notes to *Jones* v. *Jones*, 51 Am. Dec. 616–623, and *People* v. *Starne*, 85 Am. Dec. 356–364.

STATUTES—PRESUMPTION IN FAVOR OF CONSTITUTIONAL PASSAGE.—Where a bill is signed by both speakers and approved by the governor, the pre-

sumption is raised that it has been constitutionally passed: *People* v *Starne*, 35 Ill. 121; 85 Am. Dec. 348, and note; *Spangler* v. *Jacoby*, 14 Ill. 297; 58 Am. Dec. 571; *State* v. *McClelland*, 18 Neb. 236; 53 Am. Rep. 814. It need not affirmatively appear from the journals of the two houses of the legislature that every act required to be done in the enactment of a law has been done: *People* v. *Dunn*, 80 Cal. 211; 13 Am. St. Rep. 113. A court will presume facts to support a statute, upon the existence of which the validity of such statute depends: Note to *Wellington et al., Petitioners*, 26 Am. Dec. 645.

HAYDEN *v.* YALE.

[45 LOUISIANA ANNUAL, 362.]

INSOLVENCY—ASSIGNMENT—VALIDITY OF—CONFLICT OF LAWS.—A voluntary assignment in insolvency for the benefit of creditors, if valid where made, is valid everywhere unless repugnant to the law of the place where property of the insolvent is situated, and detrimental to the rights of domestic creditors in the latter jurisdiction, and gives to the domestic court jurisdiction to prevent unlawful preferences with respect to property in another jurisdiction when such preference is sought to be obtained by resort to the courts where the property is situated.

INSOLVENCY—ASSIGNMENT—CONFLICT OF LAWS—INJUNCTION.—When a citizen of one state makes a voluntary assignment in insolvency for the benefit of creditors, including real estate situated in another state, the courts of the state of his residence have jurisdiction by injunction or otherwise, to prevent a domestic creditor from defeating the effect of the assignment and obtaining a preference over other domestic creditors in relation to such real estate. If the creditor, subsequently to the assignment, attaches and advertises such realty for sale under a judgment recovered in the state where it is situated, and assigns his judgment to a resident of that state, the domestic court may either enjoin the sale, or, if it is made, hold the creditor liable to the other creditors for its proceeds.

EQUITY—JURISDICTION OVER PERSON IN RELATION TO PROPERTY IN ANOTHER JURISDICTION.—Equity acts *in personam* primarily, and when a person against whom relief is sought is within the jurisdiction, the court may make a decree as to any act, contract, or equity subsisting between the parties respecting property situated beyond its jurisdiction to prevent any inequitable act or transaction from being done in such foreign jurisdiction in relation to such property, or if such inequitable act has been done the court may order a restoration of the proceeds of the reprobated transaction as justice may require.

H. H. Hall, for the appellant.

T. J. Semmes, for the appellees.

363 WATKINS, J. Haynes and Rogers, availing themselves of the insolvent laws of this state, as a firm and as individual members thereof, made a cession of their property to their creditors, in due form of law, and same was duly accepted by

the proper judge for the benefit of their creditors. Amongst other assets surrendered was a tract of valuable land with improvements, situated in Leflore county, state of Mississippi.

Prior to the cession and surrender of said insolvents, the present defendants instituted suit against them upon a debt of some two thousand three hundred dollars [364] and obtained the sequestration of one hundred and thirteen barrels of sugar; but by the operation and legal effect of the cession of the defendants, Haynes and Rogers, this seizure was released, the sugars were transferred to the possession of the syndic, and the sequestration suit was cumulated with the insolvency proceedings, where they have since remained undetermined.

The commercial firm of Yale and Bowling is, and was at the time of the cession, a citizen of Louisiana, domiciled in New Orleans, and likewise was James Bowling, one of the members of the copartnership, though Cyrus Yale, the other member, was a citizen of New York; but he died *pendente lite*, and his residence is eliminated from the case as a controvertible question.

Immediately after the cession the defendants instituted suit against Haynes, one of the insolvents, in the circuit court of Leflore county, Mississippi, and procured the attachment of the lands that are embraced in and covered by the schedule of the insolvents, and prosecuted that suit to judgment.

Thereunder they caused suitable writ to issue, and said lands to be ordered sold at auction, and same were thereunder sold subsequently, realizing two thousand dollars, approximately, as proceeds thereof.

Pending sale proceedings, the defendants, Yale and Bowling, assigned all their rights in and to said judgment to certain citizens of the state of Mississippi, who became the adjudicatees of said property.

This suit has for object a recovery from the defendants, Yale and Bowling, by the syndic, the proceeds and avails of the sale of said real estate, on the ground that they, as Louisiana creditors of the insolvents, were bound by the insolvency proceedings, and had no legal right to lay an attachment on the property of insolvents, though situated in Mississippi, and thus defeat the operation of the insolvency laws of the state of Louisiana thereon.

The averment of plaintiff's petition is that Yale and Bowling have the proceeds of the sale of said lands in their pos-

session "in violation of the laws of this state, and more particularly of the insolvent laws thereof, to which they, individually and as a commercial firm, were subject and amenable. The said writ of attachment issued in violation of the rights of the insolvency aforesaid, and that said judgment was obtained by said Yale and Bowling in violation of said rights; and that said proceedings cannot vest in them the right to [365] retain said money; and that petitioner is entitled to recover the same from them," etc.

On the trial judgment was pronounced in favor of the defendants, and the plaintiff has appealed.

The contention of the defendant's counsel is that "if the property attached had been personal property, the syndic, perhaps, might have enjoined Mr. Bowling from prosecuting the [attachment] suit" in the Mississippi court; but as "lands situated in Mississippi do not pass to the creditors, or become assets of the insolvent in Louisiana, therefore Louisiana creditors are not affected by an attachment of such lands at the instance of a Louisana creditor."

Per contra, the contention of plaintiff's counsel is that:

"This is not a suit which seeks to affect real estate, as such, in Mississippi. That it is a suit which seeks to restore to the common fund of the Louisiana insolvency proceedings an asset which had been diverted by a Louisiana creditor, who was passively and actively, theoretically and practically, a party to these proceedings.

"He is sought to be deprived of the undue advantage he has attempted to take of his co-creditors, because, but for his action, the Louisiana syndic would have been able to realize upon this Mississippi asset and bring its proceeds into the Louisiana courts.

"And the question therefore is, not whether a Mississippi court will give effect to the insolvent laws of Louisiana to the prejudice of any attaching creditor, but it is whether or not a Louisiana court will permit a citizen of this state, bound by its insolvent laws, and an actual party to the insolvent laws in question, to enforce a Louisiana contract by diverting in a sister state an asset of the insolvent from his co-Louisiana creditors."

The pertinent provisions of the insolvent laws are:

1. That the debtor making a "voluntary surrender," or "cession of his property to his creditors," "shall annex to his petition his schedule, [which] shall contain a

statement of all his property, as well movable as immovable, and his rights and actions," etc: Rev. Stats., sec. 1786.

2. That upon being convinced that the debtor has complied with all the formalities prescribed by law, the judge "shall indorse on the schedule that the cession of all the property of the insolvent is accepted for the benefit of his creditors": Rev. Stats., sec. 1789.

3. That "from and after such cession and acceptance all the property [sic] of the insolvent debtor mentioned in the schedule shall be fully vested in his creditors, and the syndic shall take possession of and be entitled to claim and recover all the property, and to administer and sell the same according to law": Rev. Stats., secs. 1791, 1794.

In view of the foregoing unambiguous provisions of the insolvent laws, it seems apparent that the insolvent, Haynes, passed to his creditors, through the instrumentality of his cession and its acceptance, an undoubted title to his Mississippi realty, as well as to his Louisiana estate generally.

Such are the terms of his schedule and the judge's acceptance of his cession; and, as a matter of law, those provisions are read into the judge's order of acceptance independently of the terms of the cession and the schedule.

Such a thing as a partial surrender by an insolvent is not contemplated, for the law plainly declares that his schedule shall contain a statement of all his property: *Duncan* v. *Duncan*, 3 Mart. 232; *Schroeder* v. *Nicholson*, 2 La. 354.

All the debtor's rights and property pass to his creditors by his surrender, whether placed upon his schedule or not, and the syndic may sue to recover them: *Muse* v. *Yarborough*, 11 La. 531; *Levy* v. *Jacobs*, 12 La. 109; *Baldwin* v. *Union Ins. Co.*, 2 Rob. (La.) 133; *West* v. *His Creditors*, 8 Rob. (La.) 123; *Dwight* v. *Smith*, 9 Rob. (La.) 32; *Dwight* v. *Simon*, 4 La. Ann. 490.

The acceptance of a cession vests the property in the creditors, so as to be no longer liable to seizure or execution: *Rivas* v. *Hunstock*, 2 Rob. (La.) 187; *Lawrence* v. *Guice*, 9 Rob. (La.) 219; *Smalley* v. *His Creditors*, 3 La. Ann. 387; *Fitzgerald* v. *Philips*, 4 Mart. 562; *Dwight* v. *Simon*, 4 La. Ann. 490.

Nothing done after acceptance of the cession can affect the creditor's rights: *Bowles* v. *His Creditors*, 6 La. Ann. 680.

There is no positive declaration of our law to the effect that the cession shall include property of the debtor situated

in another state; but we think the contemplation of the law clearly is that such property should be included in his schedule. But whether such is or is not the law, in this instance the insolvent, Haynes, did surrender his Mississippi property to his creditors generally, and it is covered by and included in the judge's acceptance.

Accepting this as a proper construction to be placed upon the cession and acceptance of Haynes, the *status* of the property in Mississippi is fixed *quoad* Louisiana creditors at least, and as, in this controversy, no Mississippi creditors are concerned, and none of them are made parties to this suit, it seems clear to our minds that this [367] court has jurisdiction to deal with the parties before it, as law and equity require.

While it is quite true that, with reference to the extraterritorial effect of insolvent laws, there has been a great contrariety of state decision, and particularly with regard to their operation and effect upon real property situated without the territorial limits of the state of such insolvent laws; yet it may be accepted as axiomatic that, in case of voluntary assignment or surrender, if valid where made it is valid everywhere, unless repugnant to the policy of the *lex rei sitæ*, and in detriment to rights of domestic creditors within the latter jurisdiction, because such an assignment is the exercise of a personal right of the owner to dispose of his effects as he chooses.

And further, that where rights of creditors of the domicile are not concerned, the courts of a foreign jurisdiction will permit an assignee or receiver of another jurisdiction to take possession of the insolvent's property found within the limits of the former and remove same or its avails into the latter in pursuance of the laws thereof: 8 Am. & Eng. Ency. of Law, 284, 287; and the numerous adjudicated cases cited in notes.

It is likewise axiomatic that in cases of a conflict between the law of the former and that of the *rei sitæ*, or the custom of the place where the property is situated, the latter will prevail: Rorer's Interstate Law, 138.

These principles of law and comity being conceded and accepted, what is the state of the case before us?

At the the time of the surrender and acceptance the Mississippi property was included in the schedule of the insolvent, Haynes, who was and is a citizen of Louisiana, and passed to the creditors of said insolvent by the acceptance of

his cession, and among the number to the defendants, Yale and Bowling.

At that time there were no creditors of the insolvent, Haynes, in the state of Mississippi, and no suit or proceeding pending in the courts of that state, in any way affecting his person or property there or his cession in the state of Louisiana.

Consequently, the effect of the attachment of the property of Haynes, in the state of Mississippi, by Yale and Bowling, subsequently to the cession of Haynes and Rogers in Louisiana, and their assignment of their judgment of citizens of the state of Mississippi, pending sale proceedings thereunder, was to defeat the claims of the [sic] syndic of the insolvent thereupon, and put it beyond the control of the Louisiana creditors of the insolvent.

The question propounded by plaintiff's counsel then recurs: Will a Louisiana court permit a citizen of this state, bound by the insolvent laws and a party to the insolvent proceedings in question, to thus divert a portion of the property of the insolvents that is covered by the cession?

We have been cited to no case that has been decided by this court where this question has been directly involved and adjudicated, and we know of but one—and that is *Prager* v. *Micas*, 36 La. Ann. 75—though the discussion is not elaborate nor is the reason for deciding assigned. But there are two adjudications of this court in similar cases, where, to our thinking, this principle has been recognized. One of those cases is *McDowell* v. *Read*, 8 La. Ann. 391, in which occurs this declaration; viz:

"In relation to annulling the deeds of trust the judge was of opinion that the situation of the real property out of the jurisdiction of the state was an obstacle to the courts rendering any judgment, where the object was to recover it.

"We think the case referred to by the counsel for the plaintiffs establishes the principle that where a court is called upon to enforce a right it may avail itself of its jurisdiction over the person to do justice relative to a subject matter beyond its territorial jurisdiction, though lands be affected by the decree.

"The contract made here between the defendants and Mount is the subject matter upon which the court is called upon to act. Its validity is drawn in question. The responsibility of the trustees to other creditors than those provided for

depends upon its legality. Even if the judgment to be rendered should not be efficient in the state where that property is situated, that fact, were it ascertained, we think, would not be sufficient to authorize the court to withhold its action upon the contract."

The other case is *Mussina* v. *Alling*, 11 La. Ann. 568, in which *McDowell* v. *Read*, 3 La. Ann. 391 was quoted and referred to with approval. "That cause," say the court, "was remanded to ascertain if the garnishee, resident in New Orleans, had any *money in his hands, the proceeds of certain lands and slaves in Mississippi*, which, by a *contract* made in New Orleans, had been conveyed to him in trust, with power to sell, for the benefit of certain preferred creditors of the [369] grantor, who was the defendant in execution, and to the prejudice of the complainant, who resorted to the garnishee process. The court only intimated by its judgment that if the garnishee *had money in his hands, the proceeds of this arrangement made in Louisiana, between Louisiana citizens in violation, or in fraud of her laws, he should not be protected by his own reprobated contract from paying it over to the seizing creditor.*" [Our italics.]

In the instant case plaintiffs do not demand the revocation of the judicial sale, made of the Mississippi real estate of Haynes, to the assignees of the judgment of Yale and Bowling, in the courts of Mississippi against Haynes.

He does not question the jurisdiction or authority of the Mississippi court to render such judgment and to cause such sale to be made. He does not deny the correctness or regularity of those proceedings in any respect. He does not assert that the assignees of said judgment were in any manner subordinated to the control of the Louisiana insolvency proceedings. But he does claim that the Louisiana court had undoubted jurisdiction over the insolvency of Haynes and Rogers and over the other defendants, as citizens of Louisiana, bound by those insolvency proceedings to compel them to do justice relative to the money in their hands as proceeds of the Mississippi property of Haynes, in fraud of our law and in violation of the rights of the domestic creditors of said insolvent.

It is the act and contract of the defendants with which the court was called upon to deal, and not the property in Mississippi, nor the assignees of Yale and Bowling's judgment in Mississippi.

The Massachusetts court had this identical question before it in the case of *Cunningham* v. *Butler*, 142 Mass. 47, 56 Am. Rep. 657, and it may be instructive to analyze it with reference to the facts of the instant case.

Daniel C. Bird, a citizen of Massachusetts, being unable to meet his bills at maturity, suspended payment, being at the time indebted to Butler, Hayden & Co., citizens of and doing business in the same state. Being informed of their debtor's suspension, said creditors made an assignment of their claim to a citizen of New York, who at once instituted suit in a court of that state against Bird, and garnisheed Claflin & Co., who were indebted to him.

Subsequently regular insolvency proceedings were instituted in a Massachusetts court, and assignees were duly appointed for the insolvent [370] estate of Bird, the firm of Butler, Hayden & Co. being present and participating therein.

Thereafter the assignees brought suit in a court of Massachusetts against Butler, Hayden & Co., enjoining and restraining them "from proceeding to further continue the suits against Bird and from attempting to collect by suit or otherwise any money or other thing on account of the claim against Bird or that they be ordered to transfer to the assignees all their right, title, and interest by, or under, or on account of their claim so that the assignees may, as the effect of said order, have full right to receive all money due from Claflin & Co. without any hindrance or interference of Butler, Hayden & Co. therewith.

Upon this state of facts the Massachusetts court held and decided: "In the case at bar it is true that the defendants had made their attachment in New York before there had been any assignment in insolvency in this state actually executed, but this was done with full knowledge on their part that the debtor, Bird, was embarrassed and had suspended payment, and, necessarily, with intent to avoid the effect of the assignment, so far as the property attached was concerned.

"*As residents of this state they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court and amenable to its process, and should be enjoined from prosecuting a suit, the effect of which, if successful, will be to work a wrong and injury to other residents of the state.*" [Italics are ours.]

We understand plaintiff to demand that identical relief here, and, for a stronger reason, should his prayer prevail, because Haynes and Rogers had made a cession in a Louisiana court, the effect whereof was to dissolve a previous suit and sequestration of the defendants and transfer same into the insolvency proceedings; and subsequently thereto they instituted suit in their own names in the state of Mississippi, on the same debt, against one of the insolvents, and caused to be attached property which was included in the insolvent's schedule. Nor was that all. They obtained a judgment in the Mississippi court, recognizing their privilege as attaching creditors, and entitling them to be paid from the proceeds of sale of the attached property when made, and issued execution and caused the property [371] to be seized and advertised for sale. Thereupon they made a *bona fide* and actual transfer of their judgment, with full subrogation, to citizens of the state of Mississippi, to whom the property of Haynes was adjudicated by an indefeasible title.

By this means the property was diverted from the Louisiana insolvency, and its proceeds and avails appropriated exclusively by Yale and Bowling to the detriment and injury of other creditors of the insolvent, and in direct violation of the letter and spirit of Louisiana insolvent laws.

The case of *Cunningham* v. *Butler*, 142 Mass. 47, 56 Am. Rep. 657, was appealed to the supreme court, and was therein affirmed: *Cole* v. *Cunningham*, 133 U. S. 107. In treating this question the court made an elaborate summary and analysis of authority, and in the course of their opinion said: "The jurisdiction of the English court of chancery to restrain persons within its territorial limits and under its jurisdiction from doing any thing abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the institution or prosecution of an action in a foreign court, is well settled."

So, in *Penn* v. *Lord Baltimore*, 1 Ves. Sr. 444, 2 L. Cas. Eq. 1806, it was held to be a well-recognized principle that as equity acts *in personam* primarily, the court may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity subsisting between the parties respecting property situated outside of the jurisdiction.

In *Massie* v. *Watts*, 6 Cranch, 148, Chief Justice Marshall, speaking for the court, said of an action which was instituted in Kentucky to compel a conveyance of the legal title to land

situated in Ohio: "This court is of opinion that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable *wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.*" [Our italics.]

A similar doctrine is announced in *Pennoyer* v. *Neff*, 95 U. S. 714; also in *Watkins* v. *Holman*, 16 Pet. 25, and *Corbett* v. *Nutt*, 10 Wall. 464.

In *Phelps* v. *McDonald*, 99 U. S. 298, the superior court puts the proposition thus clearly and forcibly: "Where the necessary parties are before a court of equity it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. [372] It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ* which he could do voluntarily, to give effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.*"

Judge Story announces a similar doctrine: "It is now held," says that author, "that whenever the parties are resident within a county, the courts of that county have full authority to act upon them personally, with respect to the subject of suits in a foreign county, as the ends of justice may require, and, with that view, to order them to take, or omit to take, any steps and proceedings in any other court of justice, whether in the same county or in any other foreign county": Story's Equity Jurisprudence, secs. 899, 900.

In *Allen* v. *Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187, the Alabama court very forcibly and perspicuously states and approves this doctrine. Our own jurisprudence is likewise in accord with that principle: *Edwards* v. *Ballard*, 14 La. Ann. 362.

To the same effect a great many other decisions of the highest courts in different states in the union might be cited in affirmance of the same principle, but we deem it unnecessary to quote them. On reason and authority we think it clear that the act and contract of the defendants, with relation to the Mississippi property of the insolvent, Haynes, was in clear and direct violation of the insolvent laws of this state, and in derogation of the rights of his domestic creditors, and

that this court has undoubted jurisdiction and authority to compel them to surrender and pay over to the plaintiff, as syndic, the money they realized from the transaction.

In our opinion it is immaterial that the defendants only assigned their judgment pending the sale proceedings in Mississippi; the important and distinguishing feature of the transaction was that they made an assignment to citizens of Mississippi, and thus created a barrier that was impassable by the syndic.

The amount realized by the transaction was two thousand and thirty-five dollars, and for this sum plaintiff is entitled to judgment.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered [373] and decreed that the plaintiff do have and recover of and from the defendants the sum of two thousand and thirty-five dollars, with legal interest from judicial demand, and all costs of both courts.

ON APPLICATION FOR REHEARING.

One of the grounds on which counsel rely for a rehearing is, that while it is true that a court having jurisdiction of the parties has the power to make a decree affecting real estate beyond that jurisdiction in so far as such parties are personally concerned, yet that it is equally true that such court, not possessing jurisdiction of the *situs* of such realty, is powerless to make a decree for the sale or transfer of the same.

This proposition is distinctly announced in our opinion, and is the foundation of it, and the very reason on which we found and held the defendant personally responsible to the syndic of Haynes was that, by the assignment they had made of their claim and judgment to citizens of Mississippi, the courts of that state had caused his land therein situated to be sold and placed beyond the reach of the syndic—it being the established jurisprudence of the courts of the country that there is only a rule of comity existing among the states whereby the rights of nonresidents can be enforced in the absence of resident creditors, or claimants to property situated within the limits of the latter's state.

They claim that our judgment is excessive in amount, and should be reduced from two thousand and thirty dollars to sixteen hundred dollars. We think the amendment should

be allowed, and it is so ordered, and, as thus amended, our former decree is maintained.

Rehearing refused.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—CONFLICT OF LAWS.—An assignment for the benefit of creditors made in another state by a resident thereof, if valid where made, is also valid in this state, unless detrimental to its citizens: *Consolidated Tank Line Co.* v. *Collier*, 148 Ill. 259; 39 Am. St. Rep. 181, and note. See, also, the note to *Chipman* v. *Peabody*, 38 Am. St. Rep. 440, where the cases are collected.

EQUITY—JURISDICTION OVER PROPERTY IN ANOTHER STATE.—A suit in equity may be maintained and remedies granted which affect and operate upon the person of the defendant and not upon the subject matter, when it is situated in another state, but the parties are within the jurisdiction of the court, although such subject matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts toward it, and it is thus ultimately, but indirectly, effected by the relief granted: *Allen* v. *Buchanan*, 97 Ala. 399; 38 Am. St. Rep. 187, and note. This question as presented by the principal case is fully treated in the extended note to *Newton* v. *Bronson*, 67 Am. Dec. 95.

LEGENDRE *v.* NEW ORLEANS BREWING ASSOCIATION.

[45 LOUISIANA ANNUAL, 669.]

CORPORATIONS—STOCKHOLDERS—RIGHT TO INSPECT BOOKS—REMEDY.—Stockholders in a corporation have a right to inspect and examine its books at any reasonable time, and a denial of this right by the corporation in a proper case exposes it to an action, either of *mandamus* or for damages.

CORPORATIONS—INSPECTION OF BOOKS—MANDAMUS.—The right of a stockholder in a corporation to inspect its books is not so absolute that *mandamus* issues to compel such inspection without regard to facts or circumstances. The reasonableness of the request for an inspection must be considered.

CORPORATIONS—INSPECTION OF BOOKS—REFUSAL OF RIGHT WHEN JUSTIFIABLE.—The refusal of the right of a stockholder to inspect the books of a corporation of which he is a member is justifiable when curiosity is the motive, or when the object is manifestly in opposition to the interests of the corporation.

CORPORATIONS—RIGHT OF STOCKHOLDER TO INSPECT BOOKS—DAMAGES FOR REFUSAL.—An error of an officer in a subordinate position in a corporation in refusing to permit its books to be inspected by a stockholder does not of itself expose the corporation to liability for damages. To fix its liability it must appear that the officer acted under authority, express or general, or that his act was ratified by the corporation.

CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.—A corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. To fix the liability it must either appear that the officers were expressly authorized to do the act, or that it was done

bona fide, in pursuance of general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation.

CORPORATIONS—RIGHT OF STOCKHOLDER TO INSPECT BOOKS—LIABILITY FOR REFUSAL.—A stockholder cannot hold his co-stockholders nor the corporation liable in damages on account of the refusal by an officer therein of an informal request made to allow certain corporation books to be inspected, although the stockholder would have ascertained from such inspection that the affairs of the corporation were not properly conducted by its directors.

E. W. Huntington and H. L. Dufour, for the appellants.

Charles F. Buck, for the appellee.

669 BREAUX, J. This is an action sounding in damages to the amount of thirteen thousand five hundred dollars and interest. Suit was filed on 7th March, 1892. The plaintiffs, as owners of eight hundred and thirty-eight shares of the capital stock of the defendant's association, on the eighth day of May, 1891, and thereafter, applied to the secretary of the association to examine its books, in which were recorded the transfers of stock. About that date the said stock could have been sold for one hundred and thirty-one dollars per share, and subsequently it depreciated to one hundred and fifteen dollars and fifty cents per share.

The plaintiffs allege that they have by reason of the depreciation sustained damages in the amount above stated, which they would have averted if the permission to examine the books of records of transfers of stock had been granted; that under article 245 of the constitution, and other laws, they had the right to inspect defendant's books; that the refusal to allow the examination obliges the defendant to repair the damages.

The defendant interposed the peremptory exception of no cause of action. Also the plea of vagueness. The plaintiffs presented a supplemental petition, which was filed on the eighteenth day of April, 1892, reiterating the allegations of their original 670 petition and claiming that they had been damaged, since the filing of the suit, in the further sum of ten thousand dollars, making the aggregate twenty-three thousand five hundred dollars, claimed as damages.

A second supplemental petition was subsequently filed in which it was alleged that the books they applied for permission to inspect were, in addition to the book alleged in their original petition, defendant's stock ledger and the bills payable book, cash, and ledger book, and journal; further, that

on the eighth day of May, 1891, these books showed that large sales of the stock of the company had been recently made; that the company had borrowed money to pay dividends; that its affairs were not conducted by the directors; that these books were the only source from which they could obtain information of the facts alleged; that had they been allowed to inspect these books these facts would have come to their knowledge; they would have foreseen the inevitable depreciation of their stock and prevented the loss by selling their certificates of shares. They reiterate their demand for the difference in the value of the stock.

The district court maintained the exception of "no cause of action," and rejected appellants' demand at their costs. The plaintiffs invoke the rule that stockholders of a corporation have a right to examine its books at any reasonable time. The following authorities sustain the rule: Const. 1879, art. 243; *State* v. *Bienville Oil Works Co.*, 28 La. Ann. 204; *Cockburn* v. *Union Bank*, 13 La. Ann. 289. The rule is conceded by the defendant. The constitutional right to inspect the books at a reasonable time cannot reasonably be denied. There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books.

A denial of the right by the company in a proper case exposes the corporation to an action, either of *mandamus*, whereby the custodian of the books is ordered by the court to permit the desired access to them, or in an action of damages against the corporate officers who prevented the examination.

The responsibility of the corporation for the acts of the agent and [671] the right of a stockholder to sue, in a proper case, are not denied in argument.

The question presented is, whether, upon the demand which was made upon the secretary for permission to examine certain books, and his refusal, plaintiff can maintain an action for damages against the defendant company.

It may be incidentally stated that *mandamus* is a remedy preferable to a suit for damages: Cook on Stocks and Stockholders, sec. 511. But the right to inspect the books is not so absolute that *mandamus* will issue without regard to facts and circumstances. The reasonableness of the request should be considered. Though the right to inspect is the rule, and it is very seldom proper for the officers of a company to re-

fuse to allow the examination, the refusal is justifiable when curiosity is the motive or when the object is manifestly in opposition of the interest of the company.

If *mandamus* had issued immediately after the refusal, the action would have been maintained against the company only. It would have had the right to repudiate the refusal and permit the inspection. The act of the secretary is not absolutely binding upon the company in matter of inspection of the books. He cannot stand in judgment, nor can he, as agent of the stockholders, occasion damages by refusing the books, for which the company will be liable to one stockholder to the loss of the others, who are not parties and have not given the least sanction to the refusal.

Although the following quotation is not directly in point, it has certain bearing upon the subject: "Stockholders cannot sue the corporation for the purpose of remedying the wrongs committed by its officers without first applying to the directors to interfere and put a stop to the wrongs, and a refusal of the directors to do so": Beach on Receivers, sec. 885.

An error of an officer in a subordinate position in refusing to permit books to be examined is not *per se* such an error as will expose the company to the payment of damages. The secretary may be the custodian of certain books, of which he has not, however, the absolute control. They are the company's books. Persons who become officials of a corporation become the *cestui que trust* of the stockholders: 2 Wait's Actions and Defenses, 341. [672] A corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*.

"To fix the liability, it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of a general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation": Angell and Ames on Corporations, 318.

It has been decided that the member of a corporation has the same right as any other creditor to secure the payment of his demand.

An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being decreed by the court a plaintiff for the purpose of the suit, so of notes and book accounts and right to dividend: Angell and Ames on Corporations, 405.

But we have not found a decision or a principle laid down in any of the text-books suggesting the possibility of a stockholder holding his co-stockholders responsible in damages on account of the refusal of an officer to allow certain books to be inspected.

It is stated that the individual members are distinct from the artificial body endowed with certain corporate powers. This, of itself, does not demonstrate that it was ever contemplated that a secretary of a corporation might place a stockholder in the advantageous position for a certain time of having his account credited with an amount as damages, because from a date of refusal to allow inspection the stock had depreciated in value.

The defendant company was not placed in default by an informal request made of the secretary. The plaintiffs do not allege that they offered their stock for sale. They limit their complaint to the averment that the facts which they would have ascertained by an inspection of the books would have enabled them "to foresee the inevitable depreciation of their stock, and prevented their present loss by selling the same." This is not actual, but remote, and does not offer good ground to hold part of the stockholders in damages.

The bad management of the directors charged in the petition, which plaintiffs state they would have discovered, is not a cause of action which they can maintain alone and for their sole benefit, nor do directly they set it forth as a ground to recover.

They limit their action to the refusal of the secretary; though they [673] allege mismanagement on the part of the board of directors, they do not allege that the secretary had for object in refusing the books the screening of any of the directors in any mismanagement.

In reference to any loss by reason of the negligence of the directors or other officers it has been decided "that the injury is practically and ultimately an injury to the stockholders, but in the eye of the law the injury is to the corporation itself. It is for the corporation to call the directors to an account for their negligence. The action is not an action which the stockholder is to bring. The negligence affects him not directly but indirectly. It is clear also that the stockholder cannot hold the corporation itself liable for the negligence of its directors. To allow such an action would be to make part of the stockholders liable to other

stockholders for the loss, when all are equally injured, equally innocent, and equally in a position to complain": Cook on Stocks and Stockholders, 702.

The action cannot be maintained by one of the stockholders against the directors for his account and benefit, *a fortiori* an action cannot be maintained by him against the company on the ground that the secretary did not surrender the books for inspection whereby he would have ascertained that the affairs were not properly conducted by the directors.

The exception of no cause of action was properly maintained. It is therefore ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby affirmed at appellants' cost.

Judgment affirmed.

CORPORATIONS—RIGHT OF STOCKHOLDERS TO INSPECT BOOKS.—A stockholder in a private corporation, alleging misconduct in its affairs, being refused access to its books, may have a *mandamus* to compel the production of its books and papers, to enable him to ascertain and secure his rights: *Commonwealth* v. *Phœnix Iron Co.*, 105 Pa. St. 111; 51 Am. Rep. 184; *Foster* v. *White*, 86 Ala. 467; *State* v. *Bergenthal*, 72 Wis. 314. This is true though the corporation was organized in another state, if the books sought to be inspected are in this state in the custody of an officer against whom relief by *mandamus* is sought: *Swift* v. *Richardson*, 7 Houst. 338; *ante*, p. 127. In *Lyon* v. *American Screw Co.*, 16 R. I. 472, it was held that in order to justify the issuance of a writ of *mandamus* to permit a stockholder to inspect the books of the corporation of which he was a member, he must show some thing more than the expectation of benefit from knowing their contents. He must show that there is some controversy depending or some question at issue, as to which the contents of the books are of consequence.

CORPORATIONS—LIABILITY FOR UNAUTHORIZED ACTS OF OFFICERS.—The officers of a corporation are only its agents, and their acts or contracts are binding upon it only when within the scope of their authority, express or implied: *Rumbough* v. *Southern Imp. Co.*, 112 N. C. 751; 34 Am. St. Rep. 523; *Little Pittsburg etc. Min. Co.* v. *Little Chief etc. Min. Co.*, 11 Col. 223; 7 Am. St. Rep. 226, and note; *Commercial Bank* v. *Burgwyn*, 110 N. C. 267.

STATE *v.* FOURCADE.

[45 LOUISIANA ANNUAL, 717.]

CONSTITUTIONAL LAW—APPELLATE PRACTICE.—The questions of fact which the Louisiana supreme court is required by the state constitution to examine in respect to the legality or constitutionality of a fine, forfeiture, or penalty are those necessary to determine the questions arising as to such fine, forfeiture, or penalty imposed in a municipal ordinance, and not as to a fine imposed by a city recorder under an ordinance upon the facts of a special and particular case.

MUNICIPAL CORPORATIONS—DELEGATION OF POLICE POWER TO.—The legislature may delegate to municipal corporations power to adopt and enforce by-laws and ordinances on matters of special local importance, though general statutes exist relating to the same subjects.

CRIMINAL LAW—JEOPARDY—PROSECUTION UNDER ORDINANCE.—The same act committed by a person may constitute a crime against the state law and a different petty offense against municipal regulation; and the two offenses being different, each may be punished separately without violating a constitutional prohibition against placing one twice in jeopary for the same offense.

TRIAL BY JURY CANNOT BE CONSTITUTIONALLY DEMANDED in connection with a prosecution for violation of a municipal ordinance.

MUNICIPAL CORPORATIONS.—ONE WHO ATTACKS MUNICIPAL ORDINANCES AS UNCONSTITUTIONAL and illegal must plead and show with particularity in what respect they are illegal and unconstitutional.

MUNICIPAL CORPORATIONS—ORDINANCES REGULATING ADULTERATION OF FOOD OR DRINK.—Under a charter authorizing a city to prohibit the adulteration of drinks, it may by ordinance adopt a legal standard of adulteration, so long as such standard is not unreasonable or arbitrary, and does not pass beyond a fair measure for the correction of the evil sought to be guarded against; and the operation of such ordinance is not suspended by the fact that a state law makes the adulteration of drinks an offense.

P. L. Fourchy and A. Voorhies, for the appellant.

Louque and McGloin, for the appellee.

719 NICHOLLS, C. J. The defendant was charged with having on the 20th of November, 1892, violated Ordinance 6596, C. S., by selling watered or adulterated milk in the city of New Orleans.

720 Through his counsel he pleaded an exception or demurrer, in which he declared that he was ready and willing to be tried under the laws of the state of Louisiana for the state offense charged against him as a municipal offense, but that he demurred to the pending municipal prosecution on the grounds:

1. That said city ordinance under which this prosecution is carried on is unconstitutional and illegal, as it conflicts

with the constitution of Louisiana, articles 5–8, 92, and 155; as it conflicts also with Acts of Louisiana of 1880, No. 20, and of Acts of 1882, No. 82, and other state law *in pari materia*.

2. That said city ordinances No. 6022 (1879), No. 6533 (1880), No. 6596 (1892), annexed to the exception, are in conflict with the federal constitution, amendment 14, section 1, in this, that it deprives the accused, as one of a class of retail milk vendors, from the equal protection of the laws of the state; that it singles out one occupation (milk commerce), and submits it as a class to a special mode of prosecution before a recorder's court, without the benefit of jury, while, on the other hand, all other classes or occupations are to be prosecuted for a state offense, and to be tried by jury.

3. That the same act imputed to defendant under the laws, both organic and ordinary, of the state cannot be made a double offense, punishable twice, either simultaneously or otherwise; that the state laws cannot create such an anomaly, nor can the municipal ordinance of a creature of the state, having no authority but that which is specially delegated to it by the state itself, be an exception, but, on the contrary, the case is more objectionable.

4. That said city ordinance is *ultra vires*, in so far as it is in conflict with Acts of 1880, No. 20, and Acts of 1882, and other state laws *in pari materia*, and also to the extent that it attempts to duplicate the action of the state with the new methods of prosecution, and that, in face of these statutes punishing the adulteration of milk as a state offense, the municipality cannot constitutionally make it a municipal offense, and that said first recorder's court is without jurisdiction in the premises.

5. That the accused cannot thus be put twice in jeopardy for acts which, if true, would constitute the same offense for which he will be undergoing trial simultaneously in a state court and a municipal court: Const., art. 5.

6. That by said municipal ordinance the accused is deprived of liberty and property without due process of law: Art. 6.

[721] 7. That the municipal ordinance divests the accused of his vested rights of property and in merchandise without due process of law and without adequate compensation previously made (art. 155), and makes it an offense for him not to give away his property at the bidding of a police officer.

8. That said ordinance establishing a test in the adulteration of milk is unconstitutional and illegal, in violation of the laws of the state of Louisiana, and more particularly of the Act of 1882, No. 82.

This demurrer was overruled by the court. Defendant then filed a second demurrer to the effect "that City Ordinances No. 6022, A. S., No. 6533, A. S., and No. 6596, A. S., are illegal, because the state of Louisiana, by Acts of 1880, No. 20, and by Acts of 1882, No. 82, and by other acts *in pari materia*, has taken and resumed exclusive control and jurisdiction for itself of all the matters of offense and punishment contained in said state legislation in antagonism with or on the same subject matter of these municipal ordinances; that the passage and effect of said statutes are to render illegal, null, and void for the time being said ordinances, and that as long as said statutes are in force the said city ordinances are branded with illegality and unsusceptible of enforcement." The court overruled these objections.

On trial of the case on its merits the court found the accused guilty as charged, and sentenced him to pay a fine of twenty-five dollars, and in default of payment to imprisonment in the parish prison for a term of thirty days. He has appealed to this court.

The first point made in defendant's brief is that by reason of his having in the lower court drawn in question the constitutionality and legality of the ordinance, for the violation of which he has been convicted, this case has been brought to us in all its details of law and fact, including the evidence taken on the trial on which—assuming the ordinance to be legal and constitutional—the recorder founded his judgment touching the guilt of the accused under it.

In support of that position he relies upon the phraseology of article 81 of the constitution of 1879, and upon an expression found in the case of *State* v. *Dean*, 45 La. Ann. 441, where, referring to that article in connection with the cause then before us, we said: "The case must involve a question of the unconstitutionality or the illegality of the city ordinance under which the defendant and appellant [732] is being prosecuted, and hence the constitutionality of the fine or penalty which is imposed is drawn in question, otherwise the appeal is not examinable on either law or fact. If, however, the appeal presents such a question of constitutionality or

legality of ordinance and penalty, the fact as well as the law are open to examination."

Article 81 of the constitution declares that the supreme court's jurisdiction shall extend "to all cases in which the constitutionality of any tax, toll, or impost whatever, or of any fine, forfeiture, or penalty imposed by a municipal corporation shall be in contestation, whatever may be the amount thereof, and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the supreme court."

Counsel of defendant is mistaken in giving to the sentence in the case of the *State* v. *Dean*, 45 La. Ann. 441, the scope he does. Only a few months prior to this we had said in *State* v. *Callac*, 45 La. Ann. 27, which was an appeal from a conviction under a city ordinance: "In such case our jurisdiction is confined to an examination and determination of the legality and constitutionality of the ordinance under which said fine and imprisonment were imposed. With the evidence in the case on which the recorder founded his judgment we have nothing whatever to do."

The only object the court had in the Dean case was to show that as presented to it there was involved in it neither questions of law nor of fact under article 81 of the constitution. When it declared that should a case come before it involving a question of law or of fact, or of both, under that article, it would deal with it, the court simply followed the wording of the article itself.

The fine, forfeiture, or penalty whose constitutionality or legality this court is directed to examine into and pass upon regardless of amount is that imposed by the city council in the ordinance, and not that imposed by the recorder under it when legal on the evidence and facts of a special case going to show that a particular person had violated its provisions.

Were defendant's position correct this court would be converted practically into a court of appeals as to infractions of the most trivial ordinances of all the municipal corporations in the state, at the instance of persons convicted thereunder, whilst persons convicted of state crimes are permitted to appeal simply on questions of law, and then only where the punishment of death or imprisonment at [723] hard labor may be inflicted, or a fine exceeding three hundred dollars has been actually imposed.

The "questions of fact" which we are called upon to examine are those which are essential to be examined for the purpose of determining the constitutionality or legality of the fine, forfeiture, or penalty imposed by the city itself.

A municipal ordinance imposing a fine or penalty may, from the standpoint of the regularity of all the proceedings leading up to and inclusive of its enactment, be absolutely faultless, and yet the ultimate act done or enacted may be inherently or intrinsically illegal or unconstitutional. On the other hand, the latter may be perfectly unassailable, and yet the ordinance be illegal or unconstitutional by reason of some fact or circumstance connected with its passage. It may, for instance, have been presented in a wrong manner at a wrong time, or not voted for as directed by law. It is to facts of this class or character that article 81 of the constitution refers when it says that "the appeal on the law and the fact" shall be directly to the supreme court.

The distinction between the illegality of a fine, forfeiture, or penalty imposed by the municipal corporation and the correctness of that imposed by the recorder, and between the illegality of the ordinance and that of proceedings or action taken under it, is plain and broad, and has been repeatedly recognized by us. The two cases already cited of *State* v. *Callac*, 45 La. Ann. 27, and *State* v. *Dean*, 45 La. Ann. 441, both refer to it.

In *Favrot* v. *Baton Rouge*, 38 La. Ann. 230, a suit which presented the question of the legality of a tax, and in which the tax was resisted on the further ground of the illegality of the assessment and irregularities in the mode of levying and collecting the tax, this court said "it would entertain the appeal on one branch of the contestation—the illegality of the tax—and ignore the appeal on the other branch of the case." The same doctrine is announced substantially in *Gillis* v. *Clayton*, 33 La. Ann. 285; *Stubbs* v. *McGuire*, 33 La. Ann. 1089; *State* v. *Judge*, 36 La. Ann. 286; *Cobb* v. *Tax Collector*, 36 La. Ann. 801; *State* v. *Judge*, 37 La. Ann. 898; *Adler* v. *Board of Assessors*, 37 La. Ann. 507; *Minor* v. *Budd*, 38 La. Ann. 99; *New Orleans* v. *Schoenhausen*, 39 La. Ann. 237; *Bush* v. *Police Jury*, 39 La. Ann. 899.

If, on an examination of this case, we find the ordinance attacked to be illegal and unconstitutional, the judgment of the recorder will [724] necessarily have to be set aside, and defendant will have no interest in presenting to us the evi-

dence taken on the trial; if, on the other hand, we maintain the legality of the ordinance, then in so doing we exhaust our powers and reach the limit of our inquiry.

The next position maintained by the defendant is that the city of New Orleans has no powers but such as are delegated to her by the state—that the state may at any time in its own discretion withdraw, modify, suspend, or supersede for a limited time or absolutely the exercise of such delegated power, and, therefore, whilst the section of the city charter (Act No. 20 of 1882, sec. 7) which authorizes it "to prevent the sale of adulterated drinks" is not repealed by Act No. 82 of 1882, yet in the Act No. 82 the state took jurisdiction itself over the subject matter, and, by so doing, the powers of the city were suspended, and would remain in abeyance and dormant so long as the state statute was in force, but "awaking the moment it is repealed."

In defendant's brief it is said that the power delegated to the city would have justified it in passing Ordinance 6596 (the ordinance attacked) had not the state superseded or qualified exercise of the power by exercising it itself in its sovereign capacity.

In the case of *State* v. *Labatut*, 39 La. Ann. 514, and *State* v. *Callac*, 45 La. Ann. 27, we held that the powers of the city of New Orleans under the section referred to were not repealed by the Act of 1882. That statute has no repealing clause, and therefore it was urged that there was such a "conflict" between its terms and those of the city charter that there was an implied repeal, and the powers of the city could no longer be legally exercised.

The same argument is urged in the case at bar, though under a change of expressions; instead of claiming that the powers have ceased by "repeal," it is now contended that they are withdrawn by "suspension." In all the cases, however, the argument rests upon a "conflict" which we have held does not exist. We see no reason for altering our views as expressed in the opinions rendered in the decisions mentioned. Defendant urges that he is charged with an act which the city contends she has the right to punish, although the identical act is for the same purpose denounced and punished as a state offense, and that for the same act which the state has made a state offense the municipality has no right to institute a municipal prosecution and punish as a municipal offense, and that the state having now constituted the offense

one against the state, he cannot, [725] through the instrumentality of the ordinance, be deprived of his constitutional rights of being charged only through an indictment or an information, and of being tried by jury. Defendant in this position assumes that the offense charged as a violation of the city ordinance is identically the same as that which would be charged by the state for the same act through an indictment or information; and further assumes that the moment the legislature declares that the commission of a particular act shall be punishable by the state as a state offense, the commission of the same act, which up to that time, as being violative of a municipal ordinance, would be, in the strictest sense, a municipal offense, and triable as such, must cease to be so triable, and the procedure in regard to the prosecution be forced to conform to the constitutional requirements which govern state crimes.

In the case of *McInerney* v. *City of Denver*, 17 Col. 302, this subject received a very exhaustive examination, and from the opinion rendered therein by Mr. Justice Helm we quote very freely. He said, speaking for the supreme court of Colorado:

"Great reliance is placed upon the proposition that since by general statute the act with which petitioner is charged is made a misdemeanor, punishable by indictment or information, trial by jury, etc., the ordinances involved are obnoxious to a number of constitutional provisions touching criminal cases. The legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special local importance, even though general statutes exist relating to the same subjects. An ordinance must be authorized and must not be repugnant to a statute over the same territorial area; but if there be no other conflict between the provisions of the statute and ordinance save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question: that the same act may constitute two offenses, viz., a crime against the public law of the state and also a petty offense against a local municipal regulation. The weight of authority likewise fully sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other, though if it be not so provided by statute every fair-minded judge will, when pronouncing judgment

in the second prosecution or proceeding, consider a penalty already suffered. Since [726] the act constitutes two offenses against separate jurisdictions, it is analogous to those cases where the same act is punishable under a congressional statute and also under a state law. The offenses being different there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense."

"These views are sustained by the following, among other, authorities: Cooley's Constitutional Limitations, 5th ed., 241, 242, note 1; Dillon on Municipal Corporations, secs. 367, 368, note 1; Bishop on Statutory Crimes, sec. 23; Wharton's Criminal Pleading and Practice, sec. 440; *Hughes* v. *People*, 8 Col. 536; *State* v. *Lee*, 29 Minn. 453; *Waldo* v. *Wallace*, 12 Ind. 569; *State* v. *City of Topeka*, 36 Kan. 76; 59 Am. Rep. 529; *Greenwood* v. *State*, 6 Baxt. 567; 32 Am. Rep. 539; *Howe* v. *Treasurer*, 37 N. J. L. 145; *Mayor* v. *Allaire*, 14 Ala. 400; *Hamilton* v. *State*, 3 Tex. App. 643; *Shafer* v. *Mumma*, 17 Md. 331; 79 Am. Dec. 656; *State* v. *Sly*, 4 Or. 277; *Johnson* v. *State*, 59 Miss. 543; *Wragg* v. *Penn Tp.*, 94 Ill. 11; 34 Am. Rep. 199; *McLaughlin* v. *Stephens*, 2 Cranch C. C. 148; *City of St. Louis* v. *Cafferata*, 24 Mo. 96; *Rogers* v. *Jones*, 1 Wend. 238; 19 Am. Dec. 493; *Cross* v. *North Carolina*, 132 U. S. 131." To these may be added: 17 Am. & Eng. Ency. of Law, 252; *People* v. *Detroit White Lead Works*, 82 Mich. 471; *State* v. *Recorder*, 30 La. Ann. 454.

When we come to an examination of the second branch of the question we have just alluded to, we find that Ordinance No. 6596 of the common council does not attempt to determine how or before what tribunals persons charged with its violation shall be tried. It simply declares that said fine or imprisonment is to be enforced by any court of competent jurisdiction within the corporate limits of the city of New Orleans.

If this case was lodged in the recorder's court it was not by virtue of any authority to that effect given in the ordinance itself, but under the authority of section 49 of the city charter (Act No. 20 of 1882), a state law.

Under that section recorders have the jurisdiction of committing magistrates and to enforce all city ordinances, and to try, sentence, and punish all persons who violate any legal and valid ordinance, and in section 50 all fines, penalties, and forfeitures imposed by said recorders are to be collected by them and paid to the city treasurer.

727 The power or right of the legislature to confer such authority is expressly provided for, as was said in *Mayor etc.* v. *Meuer*, 35 La. Ann. 1193, by articles 92 and 136 of the present constitution.

In that case the court said: "The distinction between crimes against the state and mere violations of municipal ordinances, and the bearing of the constitutional provisions referred to touching the respective modes or methods for the prosecution and punishment of offenses against the same, is clearly recognized by elementary writers on the subject and confirmed by frequent adjudications," and in support of that statement cited numerous authorities. The matter had been fully examined before that case in *State* v. *Gutierrez*, 15 La. Ann. 193, and *State* v. *Noble*, 20 La. Ann. 326.

In the case of *McInerney* v. *City of Denver*, 17 Col. 302, this particular question was investigated, and the court announced its views as follows: "Whatever may be the view concerning the gravity of the offense against a state law, the very fact that the legislature authorizes the city to deal with the same subject by ordinance indicates that to the legislative mind the act also properly constitutes one of those petty offenses regarded as local injuries. The public welfare requiring the maintenance of peace and good order, as well as of careful sanitary regulations in cities and towns, renders summary proceedings in many cases a necessity, and we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable prerequisite. It is hardly necessary to say that such a trial is not always essential to 'due process of law.' An ordinance is not in the constitutional sense a public law. It is a mere local rule, or by-law, a police or domestic regulation, devoid in many respects of the characteristics of public or general laws. The inquiry, therefore, is not was the act complained of a public misdemeanor by statute, or at the common law, but does the offense charged belong to a class of offenses that were usually proceeded against summarily. A careful examination of authorities has led us to the conclusion that both in this country and in England the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order, and otherwise promoting the general welfare within cities and towns, had for more than a century prior to the adoption of

our constitution been generally prosecuted without a jury": See cases already cited; Sedgwick on Statutory and Constitutional Law, [720] 496, 497; also notes on pages 487 and 491; Pomeroy's Constitutional Law, sec. 246; Proffatt's Jury Trials, sec. 95; *Ex Parte Hollwedell*, 74 Mo. 400; *State* v. *Conlin*, 27 Vt. 318; *Byers* v. *Commonwealth*, 42 Pa. St. 89; *State* v. *Glenn*, 54 Md. 572; *Ex Parte Kiburg*, 10 Mo. App. 447; *People* v. *McCarthy*, 45 How. Pr. 97; *McGear* v. *Woodruff*, 33 N. J. L. 215; *Inwood* v. *State*, 42 Ohio St. 186; *Hill* v. *Mayor etc.*, 72 Ga. 319; *Ward* v. *Farwell*, 97 Ill. 593.

Defendant in general terms attacks the city ordinance as being unconstitutional, illegal, and violative of the laws of the state, particularly of Act No. 82 of 1882. He should have pleaded and shown with particularity in what respect it was unconstitutional and illegal. We gather from his brief that the specific objection made is that the state having, as he declares, adopted a standard of adulteration, it was the duty of the municipality to have made its own standard identical with that of the state, and that the two standards not being identical, that of the city by reason of that fact is illegal.

We have already said that the offense charged against the defendant is a separate and distinct offense from that which would have been charged under the state law. The standard which defendant relies upon is by the very terms of the law adopted exclusively for the class of cases falling under it and as descriptive of a state offense.

When the general assembly conferred upon the city of New Orleans the general powers it did over the subject of the health of that city and its maintenance there was no state law on that subject, and the legislature contemplated that the council should adopt some standard.

It was not only the right but the duty of the council to adopt a standard. The dealers in milk had the right to have a well-defined rule of action by which to be governed and to which they could conform. It would be a grievance of which they would unquestionably complain if each case had to be submitted to the recorders and determined by them according to their own ideas as to whether an article sold is or is not adulterated, and is or is not hurtful or prejudicial to the public health, making the recorder's judgment, and not the council's judgment, a standard of right and wrong.

It is not shown that the ordinances are unreasonable or arbitrary, nor (as a standard of some kind had to be adopted)

that it passes [729] beyond a fair measure of correction for the evil against which it seeks to guard.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

Rehearing refused.

LEGISLATURE—DELEGATION OF AUTHORITY.—Public corporations may be invested with powers which the legislature itself might have exercised: *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106; *St. Paul* v. *Colter*, 12 Minn. 41; 90 Am. Dec. 278, and note; *City of Lexington* v. *McQuillan*, 9 Dana, 513; 35 Am. Dec. 159. See, also, the note to *Newgass* v. *New Orleans*, 21 Am. St. Rep. 373.

JUDGMENTS—JEOPARDY—PROSECUTION UNDER ORDINANCE.—An acquittal in a state court, on a prosecution by the state, will not protect the accused from a subsequent trial in a city police court for the violation of an ordinance, though the same transaction and state of facts be involved in both trials: *McRea* v. *Mayor*, 59 Ga. 168; 27 Am. Rep. 390; *Wragg* v. *Penn Tp.*, 94 Ill. 11; 34 Am. Rep. 199. Similarly a conviction and punishment under a city ordinance for keeping a gaming-house is no bar to a prosecution for the same offense by the state: *Greenwood* v. *State*, 6 Bart. 567; 32 Am. Rep. 539. But see *Huffsmith* v. *People*, 8 Col. 175; 54 Am. Rep. 550.

MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—JURY TRIAL. The enforcement of municipal ordinances and the infliction of fines thereunder without the intervention of a jury is not in conflict with the constitution securing the right of trial by jury: *Floyd* v. *Commissioners*, 14 Ga. 354; 58 Am. Dec. 559. See further on this subject the extended note to *Flint River Steamboat Co.* v. *Roberts*, 48 Am. Dec. 191.

ADULTERATION—FIXING STANDARD.—The legislature may fix an arbitrary standard and declare that all milk falling below that standard is impure or adulterated: *State* v. *Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419, and note; *State* v. *Smyth*, 14 R. I. 100; 51 Am. Rep. 344, and extended note.

STATE *v.* HARRIS.

[45 LOUISIANA ANNUAL, 842.]

EVIDENCE—DECLARATIONS AS RES GESTÆ.—When it is necessary to inquire into the general nature of the act committed, or the intention of the party committing it, what such party said at the time is admissible in evidence as part of the *res gestæ*, for the purpose of showing its true character. Generally the declaration sought to be proved must be contemporaneous with the principal act; but when there are connecting circumstances they may, even when made some time afterwards, form a part of the *res gestæ*.

EVIDENCE—DECLARATIONS AS RES GESTÆ.—An act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narration of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period.

EVIDENCE—RES GESTÆ.—When in a conflict resulting in a homicide an ear of deceased is bitten or torn off by the accused, the fact of the finding of the ear, some fifteen minutes after the fight, on the ground where the difficulty occurred, together with the acts and declarations of the accused made at that time, and in relation thereto, are admissible in evidence as part of the *res gesta*.

MURDER—EVIDENCE—THREATS.—On a trial for murder an overt act or hostile demonstration on the part of the deceased against the accused must be proved, before communicated threats by the former against the latter are admissible in evidence.

MURDER—EVIDENCE—THREATS.—In a murder case it is within the discretion of the trial court to determine whether a hostile demonstration had been made by the deceased against the accused so as to make communicated threats by the former against the latter admissible in evidence.

R. P. Hunter, for the appellant.

M. J. Cunningham, attorney general, and R. E. Milling, district attorney, for the state.

843 McENERY, J. The accused was indicted for murder, and convicted of manslaughter, and sentenced to hard labor. He appealed.

There are several bills of exceptions in the record. No. 1 contains a variance of statement of facts between counsel and trial judge. On the repeated rulings of this court we accept the latter's statement. It completely destroys the effect of the bill. The statement also shows that the district attorney withdrew his objection to the introduction of proof, without first showing an overt act on part of deceased, of threats communicated to the accused.

The second bill is as follows: "When the state had offered the testimony of the witnesses Walter Neal and Fleet Tillman to show that after the difficulty between accused and deceased had occurred, and after the deceased had gone home, some two hundred yards, Fleet Tillman, the son of the deceased, returned to the house of the accused to get his father's cap and a piece of the ear of said Tillman, deceased, which in the scuffle subsequent to the firing of the shot had been bitten or torn off by the 844 accused, and that the accused had kicked the cap toward the boy and told him to get out of his yard, and that on the discovery by the boy of the piece of ear lying on the ground the accused had put his foot on it and stamped it. Counsel for accused objected to the introduction of said evidence as not constituting a part of the *res gestæ*, that the subsequent acts of the

accused, away from and out of the presence of the deceased, and fifteen or twenty minutes after the difficulty was over, could not be connected with the difficulty itself in any way, and that such proof could only be offered to prejudice the minds of the jury against the accused, and draw their minds away from the facts of the homicide, which objections were overruled by the court and the testimony admitted for the following reasons, viz: the evidence shows that the only means Tillman had to prevent accused from shooting him again was to close with him, and in the scuffle that ensued the ear or a portion of the ear of the deceased was bitten off. The facts detailed in defendant's bill occurred so shortly after the shooting by accused as to constitute them a part of the *res gestæ*, and are also admissible to show the feelings of the accused at the time of his attack upon the deceased."

The tendency of recent adjudications is to extend rather than to narrow the scope of the introduction of evidence as part of the *res gestæ*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence as part of the *res gestæ*, for the purpose of showing its true character. The general rule also is that the declaration sought to be proved must be contemporaneous with the event sought to be proved as the principal act; but when there are connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestæ*: *Insurance Co.* v. *Mosley*, 8 Wall. 397; *Hanover R. R. Co.* v. *Coyle*, 55 Pa. St. 402; *Harriman* v. *Stowe*, 57 Mo. 93; note to *Field* v. *State*, 34 Am. Rep. 479; *State* v. *Gonsoulin*, 38 La. Ann. 459; *State* v. *Corcoran*, 38 La. Ann. 949; *State* v. *Lewis*, 44 La. Ann. 958.

Mr. Taylor, in the Law of Evidence, gives the fourth rule for the test of the admissibility of such evidence, as follows:

"That an act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narration of a past transaction nor by an isolated conversation, nor by an isolated act done at a later period": Taylor on Evidence, par. 523.

The trial judge's statement is that the ear had been severed in the fight, and that this fact had been proved.

[845] The finding of a piece of the ear on the ground, immediately after the difficulty, was a fact competent to be proved, to show the fact of the severance of the ear, and the wounds inflicted upon the deceased. The act of stamping upon the ear, and the refusal to give it to the boy, was a fact contemporaneous with the discovery of the ear, and inseparable from the narration of its discovery by the boy. The refusal to let the boy have the piece of ear was also competent and admissible evidence to prove that the accused endeavored to suppress evidence as to the fact of its having been torn or bitten off during the fight.

The incident of kicking the cap toward the boy and ordering him to leave his premises is so insignificant that it would be an absurdity and a denial of justice to disturb the verdict, because this fact had no reference to the principal one.

No. 3 was reserved to the ruling of the trial judge on the examination of a witness for the defense. This also is disposed of by the statement of the trial judge, who says that he does not "agree with counsel as to his statement in the bill. The cross-examination by the district attorney of the witness, Miss Arzela Harris, was confined strictly to matters and things testified to by the witness in her examination in chief."

No. 4. The consideration of this bill will dispose of the others, as they depend upon the fact whether or not the deceased had made a hostile demonstration against the accused. The witness was offered to prove a general threat to kill a man before sundown, made by the deceased, which would corroborate the communicated threat testified to by Arzela Harris, and also the overt act testified to by her of deceased against accused. The trial judge states that the ruling as to the general threat was in consequence of no overt act having been proved. His ruling is not, therefore, within the doctrine enunciated in case of *State* v. *Williams*, 40 La. Ann. 168.

The statement for the reasons for his rulings is thus given by the trial judge: "While Miss Harris, the daughter of the accused, did swear that Tillman (deceased) came into the house of her father with an ox-whip, she was fully contradicted by Neal and Baden, both of whom swore positively that the accused, Tillman, did not come into the house that night, and made no threats whatever; that they were there at the time they say Tillman came in with the ox-whip [846] and

made threats, and that he did not come into the house, and made no threats whatever. As to the evidence of Miss Arzela Harris, as to the overt act at the time of the shooting, it was shown by the testimony of Teddlie and Neal, that Teddlie shut the door when he went out on the gallery and took Tillman by the arm; that Harris came out the back way and from around the house; that there was no window in the front of the house; that Miss Harris, the witness, was in the house; that she was in the house during the whole difficulty, and could not have seen any thing that took place; that they were positive she was not on the gallery nor in the yard at any time during the difficulty, and whose statements are corroborated by the evidence of the witness Walker, sworn for the defense, and who was in the house himself at the time of the difficulty, and did not see any part of the difficulty, and says that Miss Harris was in the house during the difficulty outside; and further she contradicted herself in this: on being first placed on the stand she stated she was on the gallery when the shooting took place, and being recalled afterward stated she was in the yard near her father when the shooting took place."

The trial judge's ruling is that he has the sole and exclusive right to determine, after the introduction of evidence, the extent of the overt act, whether or not it was a hostile demonstration against the accused.

The counsel for the accused contends that the jury are the judges as to whether the testimony introduced as to the overt act of the deceased amounted to sufficient proof of that fact; and as to whether, at the time he fired the shot, the appearance of danger to the accused was such as to have justified him in firing upon the deceased.

The witnesses for the state all say that the deceased, on hearing footsteps behind him, on nearing the gate of accused's premises, turned partially around, when he was fired upon by accused. The testimony of Miss Harris is that at the time the shot was fired the deceased was facing the accused, having broken away from the party escorting him to the gate, and was advancing in a threatening manner upon the accused, and exclaimed: "By God! I will go into that house or die."

Since the case of *State* v. *Ford*, 37 La. Ann. 443, the rulings of this court have been uniform, adversely to the proposition submitted by the counsel for the accused: *State* v. *Labuzan*, 37 La. Ann. 489; *State* v. *Janvier*, 37 La. Ann. 644; *State* v.

Kervin, 37 La. Ann. 782; *State* v. *Jackson*, 37 La. Ann. 896; *State* v. *Brooks*, 39 La. Ann. 817; *State* v. *Black*, 42 La. Ann. 861; *State* v. *Cosgrove*, 42 La. Ann. 753; *State* v. *Christian*, 44 La. Ann. 950.

847 In that case, *State* v. *Ford*, 37 La. Ann. 443, this court said:

"There is a wide difference between evidence of an overt act and proof of the same. The theory of defendant's counsel seems to be that there is no difference between the two, and that under under the rule any testimony in favor of the commission of an overt act on the part of the deceased person is a proper and sufficient foundation for the introduction of such testimony, and that the trial judge is thus stripped of all discretion and of all power to consider the veracity or credibility of the witness making the statement. Such an interpretation of the rule is flagrantly erroneous.

"In passing on such a question, the trial judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore and not to consider testimony which his reason refuses to believe."

The ruling of the trial judge seems to have been based in strict conformity to the doctrine in this case.

Judgment affirmed.

EVIDENCE.—ADMISSIBILITY OF DECLARATIONS IN CRIMINAL CASES AS PART OF THE RES GESTÆ: See *Castillo* v. *State*, 31 Tex. Cr. Rep. 145; 37 Am. St. Rep. 794, and note, with the cases collected; and *Miller* v. *State*, 31 Tex. Cr. Rep. 609; 37 Am. St. Rep. 836.

HOMICIDE—EVIDENCE.—THREATS: See *Garner* v. *State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note, with the cases collected. Also *Palmer* v. *People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note; and *Commonwealth* v. *Holmes*, 157 Mass. 233; 34 Am. St. Rep. 270.

DESTREHAN *v.* LOUISIANA CYPRESS LUMBER CO.

[45 LOUISIANA ANNUAL, 920.]

CUSTOM AND USAGE—EVIDENCE OF WHEN ADMISSIBLE.—Custom and usage may be proved to supply evidence of the intention of the parties to a contract as well as to explain and aid in the construction of phrases therein having a peculiar or technical meaning.

CUSTOM AND USAGE—EVIDENCE OF WHEN ADMISSIBLE.—When a written contract for the sale of logs fails to express or indicate the method of measurement to be followed, proof of custom or usage is admissible to show and explain the unexpressed intention of the parties as to the mode of measurement to be adopted.

CUSTOM AND USAGE—EVIDENCE OF WHEN ADMISSIBLE.—Under a contract for the sale of logs according to "board measure" proof of custom is admissible to show the amount to be deducted for hollow or peeky logs when the contract is silent on this subject.

BOARD MEASURE IS THE NUMBER OF FEET of board produced by a log when sawed.

ESTOPPEL.—RECEIPT OF PAYMENT of toll on logs towed through a canal without stipulation that toll shall be paid upon the boat by which they are towed precludes the right of collecting toll upon such boat.

PRINCIPAL AND AGENT—ACTS OF AGENT, WHEN BINDING.—An act of an agent within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages, and is subject to its liabilities.

T. J. Semmes and Legendre, for the appellant.

H. H. Hall and S. Henderson, Jr., for the appellee.

921 BREAUX, J. It is alleged that the contract between plaintiff and defendant was executed only in part, and this suit was instituted to compel compliance.

The plaintiff, represented by her son and agent, Horace H. Harvey, agreed to sell a certain piece of land to the firm of Joseph Rathbone & Co., upon which they bound themselves to construct a lumber and shingle mill, with a capacity of not less than seventy-five thousand feet, lumber measure, per day.

In this act the plaintiff agreed to lease to them other parcels of land, on terms set forth in the act, also to grant certain privileges and rights of way.

922 The plaintiff owns a canal extending from a point near the Mississippi river to Barataria bay, a distance of about six miles.

The parties to whom she agreed to sell proposed to tow cypress logs to their mill, to be erected near the canal, a short distance from the river. They promised to pay to the plaintiff a rate of tolls on all timber by them towed through the

Harveys canal, to be determined by taking the average diameter and total length of logs, and ascertaining the lumber measurement of the timber by Doyle's Rule Tables (Scribner's Log and Lumber Book), at a charge of twenty cents per one thousand of inch board measure. The charges were to be twenty cents per one thousand of inch board measurement thus obtained. The parties agreed to embody all the items, clauses, and other conditions of this preliminary agreement in an authentic act, to be signed by them within sixty days. In written suggestions from an attorney, at the time, acting for plaintiff, the timber was to be measured as above stated.

In due time, after the agreement to sell had been completed, an authentic deed of sale was signed by the parties in which, for reasons not made clear, this act does not conform strictly with the preliminary agreement to sell. The purchasers bound themselves to pay to the vendor tolls during a period of fifteen years from the date of the act.

No reference whatever is made to "average diameter" of logs, as set forth in the agreement to sell, also in the suggestive propositions in writing preceding the act.

In subsequent acts the defendant declared itself the successor to the rights and obligations of the partnership of J. Rathbone & Co. The mill was completed and commenced running in August, 1890. A log scaler was employed, selected by plaintiff's agent, to measure the logs, each party paying one-half of his wages. He was discharged by plaintiff in May, 1892, when she became dissatisfied with the measurement. The scaler testifies that he followed the instructions of the parties concerned, by measuring the logs at the small end and by deducting for hollow or peeky logs, and by not measuring logs that would not make merchantable lumber.

In reference to the toll on the tugs, the witnesses for the defendant testify—and their testimony is not contradicted by plaintiff's witnesses—that it was stated by a representative of the plaintiff, before [923] signing the contract, that it was silent about charges upon defendant's boats while towing logs in the canal, and that therefore no charges could be required by plaintiff. (This testimony was admitted without objection.) It is proven that the rule of measurement followed is general, and that the harbor master of another canal, in which are towed larger numbers of logs, as an officer of the

state, does not charge boats towing logs on which the toll is paid.

Plaintiff, in her pleadings, complains that the logs are not measured by "Doyle's Rule Tables"; that the differnce between the actual measurement and that required by the contract is equal to forty per cent to her prejudice; that the defendant wrongfully deducts ten per cent for hollow ends; that they measure even feet, and allow no deductions for inches; that she is entitled to tolls on all boats navigating the canal, as per her tariff of charges.

The defendant denies the correctness of plaintiff's interpretation of the contract, or of "Doyle's Rule Tables," and alleges that the scaler measured the logs under the directions of her agent, at the smaller end; that he deducted for hollow butts, and rejected worthless logs; that this method of scaling in measuring cypress logs is always followed; that no tolls on boats towing logs were to be charged; that during two years bills were made out monthly, and plaintiff received payment.

The defendant reconvenes, and prays for the execution of its contract during the unexpired term, as heretofore executed.

BILL OF EXCEPTIONS.

The record discloses several bills reserved to the admissibility of testimony, of verbal declarations preceding the written acts, and to the testimony offered to prove the custom of mill men and others in measuring timber; the action, plaintiff alleges, being upon a contract.

The questions being germane they will be taken up together.

The "parol evidence rule" assumes that parties, in chosing the solemn form to express their agreement, intended to fully express 924 their intention, removing them beyond bad faith, or the treacherous tenure of "slippery memory."

As between the parties, the instrument is conclusive as to the point which it covers. Several needful points to sustain plaintiff's contention are not covered by the act.

"It being thus ascertained as a preliminary question, that the written instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the court becomes merely one of interpretation and construction of the language employed, the object being to ascertain the expressed meaning of the parties. That meaning once ascer-

tained is incontrovertible by any parol evidence; no new words can be added; the court cannot, as is said, travel out of the four corners of the paper. But the language to be interpreted is to be read in the light of all surrounding circumstances (as the phrase is), it being obviously impossible to tell what a man has said until it is ascertained what he has meant to say. Any relevant evidence, therefore, which fairly partakes of explanation, or is reasonably calculated to place the court in the situation of the parties at the time of the execution will, in general, be received": Best on Evidence, 231.

In reference to usage, this commentator approvingly quotes from Phillips on Evidence: "Evidence of usage has been admitted in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms": *Optimus interpres rerum usus*, 236.

This court has decided if a contract is silent as to quantity, parol evidence of the intention is admissible: *Campbell* v. *Short*, 35 La. Ann. 447. In the case before us for our decision there is a difference between the two acts, the promise to sell and the sale, in matter of ascertaining the measure. In neither act reference is made to hollow butts, peeky logs, or tolls on steamboats. During two years the contract was executed without requiring payment for any of the items now claimed.

The purpose not being to contradict, vary, or explain the written instrument, and it being obvious that the acts did not cover all the points of difference between the parties, evidence partaking of the nature of usage, and evidence of explanation were admissible. [925] The evidence was properly admitted

The act of the legislature referred to by plaintiff's counsel, No. 87 of 1892, is not directly authoritative as law in this case, for it establishes a scale or rule for the measurement of pine saw logs only, and can be applied in measuring other logs than pine, not as absolutely binding, but as indicating the estimate of the law-making power.

It is almost supererogation to state that contract and stipulations must determine in measuring the full contents of logs, and, in all questions relating to saps, peeky lumber, and other defects, the difficulty arises from the fact that the contract is silent as to these.

Doubtless the sellers of logs who think the usage and custom too liberal and favorable to the purchaser protect

themselves by special contract as to measurement. The contract is not full and explicit; debatable questions are unavoidable.

Both parties rely upon the "Lumber and Log Book" admitted in evidence.

The plaintiff offers the context from pages 69 to 82.

The defendant objects to that on pages 70 and 71, and contends that it is not covered by "Doyle Rule Tables," made the basis for calculating the measurement of logs.

Turning to pages 70 and 71, LOG TABLE, the head lines read:

"Round logs reduced to inch board measure, by Doyle's rule," and the instructions printed on these pages are: turn to the next page for Doyle's table. It is exceedingly difficult to determine which is Scribner's and which is Doyle's. It is "Scribner's Lumber and Log Book." His preface informs us that his original tables and those of Doyle were carefully examined and revised, and that the Doyle Log Tables have been considerably extended.

Conceding that the instructions headed as above stated are Doyle's, it does not follow, in adopting "Doyle's Rule Tables," as a basis of the measurement, that it includes the instructions or explanatory notes.

To illustrate: Preceding Scribner's tables, which form part of the book in evidence, there are directions and notes. They are not part of the tables.

926 If the logarithms of Napier, as embodied by Professor Loomis in his works, were agreed upon to abridge mathematical calculations, the agreement would not include explanatory or illustrative observations, particularly if it were not known whether they were by the former or the latter.

Moreover, the plaintiff, in the preliminary agreement, stipulated that the measurement should be made by calculating the average diameter of the logs. In the deed of sale the "average diameter" is omitted. A right, well defined, was abandoned. The rule of interpretation of authentic acts is the same as that of statutes. It is a well-settled rule of interpretation that when any statute is revised or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction: *Ellis* v. *Paige*, 1 Pick. 45; *Blackburn* v. *Walpole*, 9 Pick. 104.

"It is decisive of an intention to prescribe the provisions mentioned in the latter act, as the only one on that subject

which shall be obligatory": *Murdock* v. *City of Memphis*, 20 Wall. 590.

It was expressly stipulated in the act of promise to sell to insert "average diameter" in establishing the measure of logs. The words are omitted in the act in which it was agreed to insert them. They are not to be revived by construction.

The plaintiff claims an amount on account of the ten per cent deduction on hollow or peeky logs, and for defective logs that would not make merchantable lumber not measured.

Every witness, those for the plaintiff and those for the defendant, testify that the custom of log inspection of cypress timber, in round logs, when hollow or peeky, ten feet off length of logs shall be allowed and deducted as compensation for the defect, and that logs so defective that they will not produce merchantable lumber are not measured.

Counsel for the plaintiff does not question the correctness of the testimony proving custom. They contend that the contract must be executed as written. That the intention of the parties is determinable without regard to custom.

927 This is correct if the contract bears out the contention that the intention of the parties is expressed.

No reference is made in the contract to defective logs, but contains the following: "At a charge of twenty cents per one thousand of inch board measure thus obtained" from the logs.

BOARD MEASURE.

There is no possibility of determining the "board measure" of each log without reference to rules of measurement established by custom. The act contains no statement upon the subject.

Both, as relates to the "average diameter" and to defective logs, the parties not having agreed, custom must be consulted in determining the number of boards each log will yield. If "board measure" had been omitted from the contract, the question would arise as to the actual dimensions of a round log, without allowing for saw kerfs, worthless saps, crooked or otherwise defective logs; but "board measure" being inserted in the act, it must be determined by reference to custom, and the actual quantity of lumber must be ascertained which a log will produce under the manipulation of a competent sawyer. We understand board measure to be the

number of feet of board which a log will produce when sawed.

The contract, the interpretation of which is involved in this suit, was executed without objection. The agent of the plaintiff had charge of her interest under it, and the logs were towed through the canal, were measured, and sawed into lumber. Monthly settlements were made. He had a log scaler of his own selection. He conferred with the representatives of defendant as to the rules which should govern in measurement. They were followed. The plaintiff has not established error entitling her to relief. She is bound by the acts of her agent, acting within the scope of his authority. The settlements are final; it is not proven that they were made by the agent in ignorance of the facts. As a general rule, the knowledge of the agent is the knowledge of the principal: *Seizas* v. *Citizens' Bank*, 38 La. Ann. 435.

"Whatever an agent does, within the scope of his authority, is, in legal effect, the act of his principal, who is entitled to its advantages [928] and is also subject to its liabilities": Wait's Actions and Defenses, 220. His duty was to attend to plaintiff's interests under the contract. The supervision of the measurement of the logs was part of his duty. The plaintiff, after such a time, cannot be heard to question the correctness of the payments on the ground that she was not aware of the rule followed in the measurement.

TOLL ON BOATS.

Plaintiff claims toll upon tugs or other vessels employed solely in towing logs under the contract. Having fixed a toll, and there being no stipulation for extra charges, it includes the logs and the power towing them.

The testimony proves that in matter of toll in other canals no extra charge is exacted from the steamboat towing logs upon which toll is paid.

EVEN MEASURE.

In reference to measuring the lumber in even length, the judgment appealed from is silent. In board measure, it is stated in evidence, even length only is taken and odd ends are thrown away as worthless. The contract, we have seen, provides for board measure.

Our views coincide with those of the judge of the district court in reference to the issues involved.

Judgment affirmed at appellant's costs.

CUSTOM OR USAGE TO EXPLAIN INTENTION OF PARTIES TO CONTRACT.—Evidence of custom or usage is admissible for the purpose of ascertaining the intention and understanding of parties by their contracts with reference thereto: *Sampson* v. *Gaman*, 6 Port. 123; 30 Am. Dec. 578; *Barber* v. *Brace*, 3 Conn. 9; 8 Am. Dec. 149, and note; *Southwestern Freight etc. Co.* v. *Stanard*, 44 Mo. 71; 100 Am. Dec. 255, and note; *Burns* v. *Sennett*, 99 Cal. 363; *Holmes* v. *Whitaker*, 23 Or. 319. Usage or custom may be used as evidence to interpret a contract, but not to vary or contradict it: *McCulsky* v. *Klosterman*, 20 Or. 108; *Wolff* v. *Campbell*, 110 Mo. 114; *Foye* v. *Leighton*, 22 N. H. 71; 53 Am. Dec. 231. Usage may be proved to aid in construing a contract: *Cox* v. *O'Riley*, 4 Ind. 368; 58 Am. Dec. 633, and note; *Smith* v. *Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627, and note, with the cases collected. See, also, the extended note to *Willmering* v. *McGaughey*, 6 Am. Rep. 678.

AGENCY—LIABILITY OF PRINCIPAL.—A principal is bound by all acts of the agent within the scope of his authority: *Busch* v. *Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563; *Kircher* v. *Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731, and note; *Fifth Ave. Bank* v. *Forty-second Street etc. Ry. Co.*, 137 N. Y. 231; 33 Am. St. Rep. 712, and note; *Rucker* v. *Smoke*, 37 S. C. 377; 34 Am. St. Rep. 758.

STATE *v.* ROBERTSON.

[45 LOUISIANA ANNUAL, 954.]

MUNICIPAL CORPORATIONS—ORDINANCES BEYOND CHARTER POWERS.—In the absence of express authority granted to a city in its charter, it has no power to create, by ordinance, the office of inspector and board of inspectors of boilers and steam apparatus, and to require the owners and users thereof to employ engineers licensed by the city, and to submit such apparatus to inspection and to pay fees therefor. The enforcement of such an ordinance is not within the implied power of the city to protect the general welfare of its inhabitants, and the only implied power possessed by the city in such case is the right to locate such steam apparatus in a safe place, where explosions would do the least injury.

MUNICIPAL CORPORATIONS—ORDINANCES—IMPLIED POWERS.—A municipal corporation cannot, by ordinance, enlarge the powers expressly granted it by its charter any further than is absolutely necessary to carry such powers into effect.

O. B. Sansum, for the appellant.

E. A. O'Sullivan, city attorney, for the appellee.

954 McENERY, J. The city council of New Orleans enacted Ordinance No. 6647, council series, entitled "An ordinance providing for the inspection of steam-boilers, tanks, pipes, apparatus, etc., and to create a board of examiners and inspectors of engineers in charge of the same, and to provide for the penalties."

Section 1 of the ordinance creates the office of inspectors and prescribes the qualifications of the members of the board.

Section 2 fixes the term of office of the members of the board and the amount of the bond to be furnished.

Section 3 vests in the board the power to inspect and test every boiler and apparatus under steam pressure used to propel or operate machinery not subject to inspection under the laws of the United States, and they are required to notify all owners or users of boilers [955] and apparatus under steam pressure of the time when an inspection or reinspection and test shall be made.

Section 4 that the inspectors shall be furnished with an office at the city hall.

Section 5 requires that the owners or users of boilers or steam generating apparatus under steam pressure must have the same inspected before use and at least once a year thereafter, and for every neglect or refusal to have said inspection and test made they shall, upon conviction thereof by the recorder having jurisdiction, be fined a sum of not more than twenty-five dollars, and in default of payment of said fine shall be imprisoned for not more than thirty days, or both.

Section 6 requires every owner and user of a boiler, etc., to employ at least one competent engineer holding a license or permit from the board, and a neglect to conform to this requirement is visited by fine, and, in default of payment, imprisonment.

Section 7 provides for the examination by the board of engineers, a certificate of license costing the sum of five dollars for the first year and two dollars and fifty cents for each renewal, which is required annually.

Section 8 regulates the amount of steam pressure as allowed by the certificate of the board of examiners.

Section 11 regulates the fees for inspection, which are required to be paid by the owners of the steam machinery and boilers, and the fees for inspection are graduated from three dollars to seventeen dollars.

The defendant, owner of the Marine Dry Dock, situated within the corporate limits of the city, refused to have his boilers and machinery inspected in accordance with the provisions of said ordinance, and he was arrested, tried, and convicted before the fourth recorder's court of said city. He appealed on the ground of the illegality and unconstitutionality of said ordinance.

If the ordinance is legal and valid the power of the recorder to inflict the penalty is undoubted, since the passage of Act No. 41 of 1892, which authorizes the recorder "to enforce obedience to or to punish the violation of all ordinances passed by the city council thereof in execution of the powers and duties indicated in sections 7 and 8, and the amendments thereof of Act No. 20 of 1882, known as the charter of the city of New Orleans, by fine or imprisonment, or both, or by imprisonment in default of the payment of the fine, provided that the fine shall not exceed twenty-five dollars for each offense, nor the imprisonment more than thirty days as provided by section 12 of Act 131 of 1877."

956 The penalty, therefore, under said act can be enforced for the violation of a city ordinance, as the right has been expressly conferred by the legislature.

The only question, therefore, which is presented is as to the power of the city council to enact said ordinance. It is admitted that there is no express power granted to the city in its charter to create the office of inspector and a board of inspectors of boilers and steam apparatus, and to require the owners and users of boilers and steam apparatus to employ engineers licensed by the city, and for said users of such boilers and machinery to submit them to inspection and to pay fees therefor.

The contention of the city of New Orleans is that its charter authorizes it to pass all ordinances necessary to preserve the peace and good order of the city, and to maintain its cleanliness and health, and, therefore, it has the power to enforce by fine and imprisonment the violation of an ordinance for the protection of life and property, and that said ordinance was enacted for the protection of the lives of the citizens of New Orleans.

If said ordinance springs from a necessary and implied incident to the power expressly granted to preserve the public peace and to maintain the cleanliness and health of the city it is a valid ordinance. There can be no doubt that it does not spring from the power to preserve the public peace as incident to the exercise of that power.

Ordinances to preserve the public health have been liberally construed, and the authorities have gone to a great length in enumerating the implied powers of municipalities to enact laws to protect the community from infectious and contagious diseases, from bad water, against nuisance injuri-

ous to health, and noxious odors and gases. As the preservation of the public health and the safety of the inhabitants is one of the chief purposes of local government, all reasonable ordinances in this direction have been sustained.

The ordinance in question does not pretend to preserve and promote public health. But it is claimed that it protects the life of the citizen by providing for the inspections of steam-boilers, etc., and this is implied from the power to legislate for the public health, and that its preservation is necessary to protect the life of the citizen.

Ordinances of this character, to preserve public health, are generally directed to those objects which in themselves are presumed [957] to be injurious to the public health, such as those enacted for the purpose of abating nuisances which are injurious to health, the location and regulation of markets, hospitals, slaughter-houses, cemeteries, etc; those for the prevention of the introduction of contagious and infectious diseases and their dissemination in the community, and on all matters which may promote the cleanliness and health of the city.

The establishment of steam machinery in a particular locality is not, in itself, injurious to public health. It is dangerous only either from coming into too close proximity to it or from the explosion of boilers or the breaking of the machinery.

If the ordinance is a valid one, it must fall under the general welfare clause, either found in charters of municipalities or inferred from the powers granted. Dangerous articles, such as gunpowder, oil, dynamite, or other such articles composed of elements which are likely to explode from the slightest extraneous causes, by the agitation of the particles composing them, are generally regulated under this implied or granted authority as to their location and sale; but even in these cases an enlargement of the powers granted will not be exercised further than necessary to carry into effect the specific power granted.

In the instant case the power to create the office of inspector and a board of inspectors and examiners, with the power to examine engineers and to grant certificates of competency, and to inspect boilers, etc., is nowhere to be found in the city charter, and the necessary implication for it cannot be inferred from any of the powers granted. Probably the only implication from the granted powers found in the charter would be

the right to locate steam-boilers, machinery, and apparatus in a safe place, where an explosion would do the least injury.

It has been held, and properly so, that, under the authority to make police regulations or to pass by-laws for the good government of the corporation, it has the right to require hoistaways inside of stores to be inclosed by a railing and closed by a trap after business hours of the day. It was regarded as a reasonable regulation because it did not unreasonably interfere with private rights. But if these owners of the hoistaways had been compelled to pay for their repeated inspections there can be no doubt that the exactions would have been held to be unreasonable.

958 We have carefully examined the ordinance and find it illegal in every feature. There is no power in the charter to authorize it; it is not a necessary implication from the specific powers granted, and is unreasonable.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided, reversed, and annulled, and it is now decreed that said Ordinance No. 6647, council series, be declared null and void, and the prosecution of defendant thereunder be dismissed.

Rehearing refused.

MUNICIPAL CORPORATIONS—POWERS.—A municipal corporation has only such powers as have been expressly delegated to it and their appropriate incidents: *Wilson* v. *Beyers*, 5 Wash. 303; 34 Am. St. Rep. 858; *Whiting* v. *West Point*, 88 Va. 905; 29 Am. St. Rep. 750, and note; *Huesing* v. *Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129, and note; *St. Louis* v. *Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370. The power to enact a city ordinance must be vested in the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation, and not simply convenient: *Anderson* v. *City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175, and note. See, also, the note to *Flournoy* v. *Jeffersonville*, 79 Am. Dec. 475.

STATE *v.* LANGFORD.

[45 LOUISIANA ANNUAL, 1177.]

WITNESSES—COMPETENCY—UNDERSTANDING.—The mere fact that a witness states, on cross-examination, that she does not know the consequences, nor how she could be punished, if she testifies falsely does not render her incompetent on the ground that she does not understand the nature of an oath, especially when she exhibits as much intelligence on the witness-stand as ordinary persons of her class.

RAPE — EVIDENCE — RES GESTÆ — CORROBORATION. — A witness to whom complaint has been made by the victim of a rape, or an attempt to rape, is not, at the trial, permitted to repeat, on direct examination, all the details of the outrage, and the name of the ravisher, as subsequently reported to such witness, but can only testify to the fact that the complaint was made, and as to the condition of the victim when making the complaint. When such statements are part of the *res gesta* they are admissible, or may be drawn out by defendant on cross-examination; and they may also be admitted to corroborate the testimony of the prosecutrix, but only when her testimony has been impeached.

JURY TRIALS—IMPROPER CONDUCT OF OFFICER VITIATING VERDICT.—The fact that an officer of the court who has charge of the jury during its deliberation in a criminal case speaks reprovingly to a juror for not agreeing to a verdict which such officer conceives should be returned, and states to the juror that the case is plain, constitutes such misconduct as vitiates the verdict, and entitles the defendant to a new trial.

RAPE—SUFFICIENCY OF INDICTMENT.—An information for assault with intent to commit rape, charging that defendant, with force and arms, unlawfully did make an assault upon the prosecutrix, with intent her, the said prosecutrix, then violently and against her will feloniously to ravish and carnally know, is sufficient, although it fails to allege that the assault was made "feloniously," "forcibly," or "violently."

W. C. Roberts, for the appellant.

J. R. Land, district attorney, for the state.

1178 PARLANGE, J. The defendant has been found guilty by a jury of an assault with intent to ravish, and he has been sentenced to imprisonment in the state penitentiary for a term of eighteen months. He has appealed, and he relies upon four bills of exception to reverse the judgment of the lower court.

By his first bill of exception he contends that the prosecutrix "was not a competent witness." The only ground for this contention is that on cross-examination she stated that "she did not know the consequence, nor how she would be punished in case she testified falsely."

The judge *a quo*, in overruling the objection to the competency of the witness, stated that "from the manner of the

witness on the stand and her answers to questions, she exhibited as much intelligence as ordinary persons of her class."

1179 We understand the defendant's counsel to contend in his brief that the statement of the prosecutrix proves her to be a person who does not understand the nature of an oath. This contention is without force. There is nothing in the record to support it. The prosecutrix may well have meant that she was ignorant of the instrumentalities by which the criminal law would punish her if she committed perjury, and that she did not know what the legal penalty would be. This would neither prove her to lack "proper understanding" within the meaning of Act 29 of 1886, nor to be ignorant of the nature of an oath. We are fortified in reaching this conclusion by the statement of the judge *a quo* who heard and saw the witness, and to whom a large discretion is left in the matter.

The judge refers evidently to the intelligence and mental capacity of the witness, and he did not consider the statement as relating to her ability to comprehend the nature of an oath. Competency is the rule, incompetency the exception. The burden is on the defendant to show the witness incompetent. He has failed to do so. If his intention was to show that the prosecutrix did not understand the nature of an oath he could easily have addressed her such questions as would have made the scope of his inquiry clear to her, and would have elicited from her such an answer as would have shown plainly whether she had or had not the proper understanding of the nature of an oath.

The second bill of exception reserves the objection of defendant to the admission of the testimony of a witness who was offered by the state to prove the statements made to him by the prosecutrix as to the crime for which the defendant was being tried.

In the case of *State* v. *Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201, this court held that a person to whom complaint has been made by the victim of a rape, when placed on the witness-stand, cannot be permitted to repeat all the details of the outrage and the name of the ravisher, as reported to the witness, but can only testify as to the fact of the complaint having been made and as to the condition of the victim when making the complaint. Bishop, in his treatise on Criminal Procedure, states that this is the English and the more common American practice. To the same

effect is Greenleaf on Evidence. When the statements are part of the *res gestæ*, they are excepted from the operation of the rule just stated, and they may also be drawn out by the defendant on cross-examination. They 1180 may be admitted to corroborate the testimony of the prosecutrix, but only when her testimony has been impeached. When they are offered by the state, in making out the case against the accused and before the testimony of the prosecutrix has been impeached, they will be rejected, as was done in the case of *State* v. *Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201.

In the instant case the state offered the testimony without limitation. The testimony appears to have been offered while the state was making out the case against the accused and before the defense had opened.

The judge *a quo* states that the evidence was admissible in corroboration of the testimony of the prosecutrix, and that he limited it to that purpose. The statements could not have been admitted in corroboration, unless the testimony of the prosecutrix had first been impeached, of which there is no proof or indication in the record. On the contrary, it appears that the statements with all their details went to the jury before the defense opened. This was error.

The third bill of exception concerns the refusal of the judge *a quo* to grant the defendant a new trial, for which the latter had moved on the ground that the verdict was contrary to the law and the evidence, and that "the jury while considering the verdict herein were improperly and unduly influenced by the deputy in charge thereof, who stated to them 'that it was a plain case or straight case,' and further stated and exclaimed: 'Why, John!' one or more times when informed that one John Wilson was holding them. That by said conduct the said John Wilson was influenced and the verdict rendered by said jury vitiated."

The testimony adduced on the hearing of the motion for a new trial was reduced to writing, and the defendant having duly excepted to the overruling of the motion, and having annexed said testimony to his bill, the same is before us for review. There were several objections made to testimony offered on the hearing of the motion for a new trial, but it is unnecessary for us to pass upon them, as we can reach a conclusion on this point by considering only the testimony admitted without objection.

We are satisfied from the evidence that the deputy sheriff in charge of the jury went into the jury-room after the jury had been deliberating for some time, and on his inquiring whether the jury had agreed he was informed that the jury stood eleven to one, and that John Wilson [1181] was the one juror opposing the views of the other eleven jurors. The deputy sheriff then exclaimed and said to John Wilson: "Why, John! Plain case," or words of a similar import. Subsequently the jury agreed and brought into court a verdict against the defendant.

While bearing in mind the decisions of this court, which declare that great weight is given to the rulings of trial judges in refusing new trials, and while also bearing in mind the decisions which differentiate between misconduct which vitiates a verdict and misconduct which does not, we hold, in the instant case, that it was error to refuse a new trial. The question goes beyond the scope of mere legal formalities. It is a matter of substance which affects the rights of the defendant to a fair and impartial trial. It would be difficult to state a case of unlawful communication with the jury by the officer in charge of the jury, if a deputy sheriff can be permitted to exclaim reprovingly to a juror for not agreeing to the verdict which the deputy sheriff conceives should be returned, and if that officer can state to the juror that the case is plain: See Proffatt's Jury Trials, sec. 391.

In the case of *State* v. *Dallas*, 35 La. Ann. 900, this court reversed the sentence in a criminal case because one of the deputy sheriffs in charge of the jury stated to one of the jurors that he had heard that the defendant had been sentenced to the penitentiary. In that case the court used the following language:

"The conduct of the deputy sheriff is in the highest degree unbecoming and reprehensible, and places him in the attitude of an officer who deliberately impedes the administration of justice, which it was his bounden duty to promote, and willfully clogs the execution of the laws which he has sworn to support. A sheriff or any of his deputies having charge of a jury in a criminal case has the right of speaking to the jurors for the purpose of inquiring into and ascertaining their wants, or of conveying necessary messages from them. Such conversations, when not referring to the case, or to the accused on trial, will not vitiate the proceedings."

We are clear that the misconduct of the deputy sheriff who was in charge of the jury in this case caused serious injury to the defendant, and that his motion for a new trial should have been granted.

The fourth bill of exception contains the defendant's reservation as to the action of the judge *a quo* in overruling the motion in arrest [1182] of judgment by which the defendant urged that the information is defective in that it fails to charge that he did "feloniously" make the assault charged; and also in that it fails to charge that he made the assault "forcibly" or "violently."

The information charges that the defendant with force and arms unlawfully did make an assault upon the prosecutrix, with intent her, the said prosecutrix, then violently and against her will feloniously to ravish and carnally know. The information is sufficient: *State* v. *Bradford*, 33 La. Ann. 921; *State* v. *Sonnier*, 38 La. Ann. 962; 2 Bishop's Criminal Procedure, sec. 81.

Therefore, for the reasons stated in sustaining defendant's objections, as set forth in his second and third bills of exception, it is ordered that the verdict of the jury be set aside and that the judgment appealed from be annulled, avoided, and reversed; that the defendant be detained in custody subject to the orders of the fourth judicial district court for the parish of Grant, to await further prosecution or proceedings according to law.

WITNESSES—COMPETENCY—CHILDREN.—A boy ten years of age is a competent witness if he understands the nature of an oath: *Moore* v. *State*, 79 Ga. 498. A child having sufficient capacity to understand the nature and obligations of an oath is a competent witness: *Davis* v. *State*, 31 Neb. 247. But a child who does not understand the consequences of perjury in this life or the hereafter is not a competent witness: *Holt* v. *State*, 23 Tex. App. 1; 59 Am. Rep. 770; *Carter* v. *State*, 63 Ala. 52; 35 Am. Rep. 4, and note. To the same effect see *State* v. *Belton*, 24 S. C. 185; 58 Am. Rep. 245; and see, also, *Commonwealth* v. *Lynes*, 142 Mass. 577; 56 Am. Rep. 709. A child of any age may be a witness if capable of distinguishing between good and evil: *State* v. *Whittier*, 21 Me. 341; 38 Am. Dec. 272. In a criminal prosecution a child of six years may be a competent witness if the judge is satisfied of his intelligence and the jury are properly cautioned: *McGuire* v. *People*, 44 Mich. 286; 38 Am. Rep. 265, and note.

RAPE—SUFFICIENCY OF INDICTMENT.—An indictment for rape which alleges that the defendant "violently, and against her will, feloniously did ravish and carnally know" the woman, is sufficient: *Commonwealth* v. *Fogerty*, 8 Gray, 489; 69 Am. Dec. 264, and note. In an indictment for rape the allegation of "did forcibly ravish" is sufficient without adding "against her

will": *Williams* v. *State*, 1 Tex. App. 90; 28 Am. Rep. 399. See, also, *State* v. *Casford*, 76 Iowa, 330.

RAPE—RES GESTÆ—PROOF OF COMPLAINT BY PROSECUTRIX.—In a trial for rape the particulars of the complaint of the prosecutrix to third persons cannot be given as evidence in chief: *Oleson* v. *State*, 11 Neb. 276; 38 Am. Rep. 366, and extended note; *Cross* v. *State*, 132 Ind. 65; *People* v. *Mayes*, 66 Cal. 597; 56 Am. Rep. 126; *Parker* v. *State*, 67 Md. 329; 1 Am. St. Rep. 387, and note; *State* v. *Robertson*, 38 La. Ann. 618; 58 Am. Rep. 201. The contrary of the above doctrine is held in *State* v. *Kinney*, 44 Conn. 153; 26 Am. Rep. 436, and *Benstine* v. *State*, 2 Lea, 169; 31 Am. Rep. 593. In cases of rape any thing which the woman said or did of the *res gestæ* of the ravishment is admissible as original evidence, whether she testifies or not: *Castillo* v. *State*, 31 Tex. Cr. Rep. 145; 37 Am. St. Rep. 794, and note. On a trial for rape it is error to admit evidence of the statements made by the prosecutrix at the time of making the complaint, her testimony not being attacked: *State* v. *Campbell*, 20 Nev. 122. See, also, *Barnes* v. *State*, 88 Ala. 204; 16 Am. St. Rep. 48, and note.

STATE *v.* JUDGE OF CIVIL DISTRICT COURT.

[46 LOUISIANA ANNUAL, 1250.]

CONTEMPTS—JURISDICTION.—The power to punish for contempts, actual or constructive, is inherent in all courts of record, and is essential to the preservation of order in all judicial proceedings.

CONTEMPTS—NEWSPAPER PUBLICATIONS.—When a newspaper or other publication, being read by jurors and attendants on the courts, has a tendency to interfere with the proper and unbiased administration of the law in pending cases, the resulting liability or responsibility is not limited to a civil action for damages by the parties prejudiced thereby, but it may be adjudged a contempt of court, and accordingly punished.

CONTEMPTS—NEWSPAPER PUBLICATIONS—REVIEW OF JUDGMENT.—When it is charged that a newspaper or other publication concerning judicial proceedings is of such character as to render it a contempt of the court in which the case is pending, and the article is presented in evidence in support of the charge, it is within the power of the trial court to examine and determine the character of the publication from all the evidence, and the decision reached by such court cannot be reviewed by the supreme court under writs of prohibition or *certiorari*.

C. F. Buck, for the relators.

Respondent *in propria persona*.

1250 NICHOLLS, C. J. The petition filed in this case is as follows:

"The petition of the state of Louisiana on the relation of Ashton Phelps and Page M. Baker, respectively president and chief editor of the Times-Democract Publishing Company, which company is engaged 1251 in the business of printing,

publishing, and circulating a daily newspaper known as the New Orleans *Times-Democrat*, devoted to the dissemination of the current news of the day, respectfully shows: That on 20th of March, 1893, in a suit now pending in the honorable the civil district court for the parish of Orleans, Division 'C' thereof, presided over by Hon. F. A. Monroe, Judge, No. 35,549 of the docket of said civil district court, they and each of them were served with a paper or proceeding calling upon and ordering them to show cause, on March 21, 1893, at eleven o'clock, A. M., why they should not comply with certain requests on them made, or be punished for contempt, a copy of which is herein embodied in full, in the words following, to wit:

"STATE OF LOUISIANA.

"*Civil District Court for the Parish of Orleans.*

"PETER FABACHER,
"*vs.*
"BRYANT AND MATHERS. } Division 'C.'

"Thomas Egan, Jr., called in Warranty.

"On motion of Lazarus, Moore, and Lemle, of counsel for Peter Fabacher, plaintiff herein, of E. W. Huntington and Horace L. Dufour, of counsel for Bryant and Mathers, defendants, and of White, Parlange, and Saunders, of counsel for Thomas Egan, called in warranty, and on giving this court to be informed and to understand that there is now pending before this court in this division a cause as above entitled, wherein Peter Fabacher is plaintiff, Bryant and Mathers are defendants, and Thomas Egan is defendant called in warranty of said Bryant and Mathers; that issue was joined in said cause upon the main demand and upon the call in warranty; that after issue so joined said cause was in due course of procedure fixed for trial; that upon the prayer of the plaintiff it was to be tried by jury.

"And on further giving the court to be informed and to understand that said case was regularly called for trial on Thursday, March 16, 1893, and a jury duly impaneled and sworn to try the issues in said case, that the trial of said case was continued until Friday, March 17th, and testimony administered for and on behalf of plaintiff in support of his demand, and that there were two witnesses sworn on said trial, to wit: Peter Fabacher, the plaintiff, and John Mahone,

a witness for and on behalf of the plaintiff; that prior to the adjournment on March 17th, the jury being allowed their liberty and freedom, they [1252] were instructed by the court to hold no converse with reference to the case or the issues therein, and were especially instructed and directed not to allow any one to discuss the case which they, the jury, held, as jurors, under consideration for a verdict.

"And on further giving the court to be informed and to understand that the case was only partially tried, that all the witnesses for the plaintiff had not been heard, that none had been called for the defendants, Bryant and Mathers, and none for Thomas Egan, called in warranty, and that the case was continued for further consideration by the court and the jury until Tuesday, March 21, 1893, at eleven o'clock, A. M., when the jury were by said court directed to be present in court to hear the further testimony in the case and to pass upon the issues therein.

"And on giving the court to be further informed and to understand that a newspaper, known as the *Times-Democrat*, and published by the Times-Democrat Publishing Company, of which Ashton Phelps is president, and Page M. Baker is the manager, did on Sunday, March 19, 1893, publish, or cause to be published and circulated throughout the city of New Orleans, the daily issue of said paper, in which was contained a commentary or criticism upon the case now pending before this court and the jury, and to give their opinion, for the public's perusal, of the relative positions of the parties to this controversy, and their comments upon the testimony of the witnesses who had testified in said case, and that the effect of the said publication was to operate to the injury of all the parties to said case, and was a discussion of the case out of the hearing of the court, and had the effect of influencing the judgment of the jurors, who have been sworn to try the issues upon the evidence as adduced in court and upon the law as given to them by the court.

"And on further giving the court to be informed and to understand that the statements contained in said article are in many respects not true, and not justified by any evidence received in the case.

"And on further giving the court to be informed and to understand that if in the said comments upon the case depending before the court and the jury the said newspaper

was acting upon its own motion, it was guilty of a breach of the license and privilege of the press; and if acting from other motives, they should disclose to the court at whose suggestion or instance the said publication was made, in order that justice may be done, and that there should be no miscarriage 1252 of justice in consequence of said publication; that by their acts and doings in the premises they have been guilty of a flagrant breach of the decorum of this court, and are in contempt thereof.

"It is ordered that the Times Publishing Company, through its manager, Page M. Baker, and its president, Ashton Phelps, do show cause on Tuesday, March 21, 1893, at 11 o'clock, A. M., in open court, why the said manager and president should not disclose to the court the party at whose instance the said publication was made, and from whom the information was received, and whether the said publication was paid for, and if so, by whom; or in default thereof, why they should not stand committed for contempt of the authority of this court under the statutes and laws of the State of Louisiana in such cases made and provided."

Relators now further aver that in obedience to said order of court they did then and there appear in open court as ordered, and to said proceedings filed the following answers and return, to wit (also herein embodied in full):

"STATE OF LOUISIANA.

"*Civil District Court for the Parish of Orleans.*

"PETER FABACHER,
"*vs.*
"BRYANT AND MATHERS. } No. 35,549. Division 'C.'

"And now into this honorable court, through the under signed attorney, come Ashton Phelps, president of the Times-Democrat Publishing Company, and Page M. Baker, chief editor and manager thereof, and for return to the rule herein taken upon them to show cause why they and each of them should not make certain disclosures in reference to the publication of an article in the *Times-Democrat*, and be punished as in contempt therefor, show:

"1. This honorable court is without jurisdiction and power in the premises to inquire into the matters set forth in said rule by this proceeding and in this collateral manner, and especially that the facts and allegations in said rule set forth

and the suggestions submitted to this court thereon do not import upon their face a charge for contempt of court, or present a state of facts on which the power of this court to punish for contempt of its authority or dignity might arise, and any attempt on the part of this honorable court to inflict punishment would involve an unwarranted assumption and usurpation [1254] of judicial power not conferred by the constitution and laws of this state.

"2. Reserving the foregoing exception to the jurisdiction and power of the court in the premises, these appearers plead and aver that the article referred to made part of this answer as Exhibit 'A' was published in the usual course of the business of printing the daily newspaper known as *The New Orleans Times-Democrat*, as an item of news and an account of judicial proceedings then and there had in open court, the right to do which is privileged and guaranteed to respondent under express provisions of the constitution of this state, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of said or any publication, and the attempt herein to invoke the power of the court to punish for contempt the publishers of said article is in direct violation of the freedom of the press guaranteed by the laws and constitutions of the state and of the United States, and especially of article four of the constitution of the state, which provides that no law shall be passed 'to abridge the freedom of the press.'

"3. That for these reasons this proceeding is absolutely null and void and unconstitutional, as beyond the power and jurisdiction of the court in the manner and form and for the purpose attempted, and should be dismissed.

"And appearers pray accordingly to be discharged and all proceedings stayed, and for general relief."

Relators now further show that notwithstanding said plea of jurisdiction to the court and said special plea that the matter set forth in said rule could not be held to be a contempt of the orders or persons or dignity of the court, and were not punishable as such; that any attempt to hold the publication of said article a contempt of court involved an unwarranted usurpation of power in violation of the laws and constitution of the state as aforesaid, his Honor, F. A. Monroe, presiding over said division "C," civil district court, did entertain said proceedings and proceeded to trial thereof, and has

rendered judgment thereon, a certified copy of which, marked Exhibit "B," is filed as part hereof, decreeing that said publication constitutes a contempt of his court, but holding under advisement what penalty he shall inflict therefor. Relators show, for the reasons hereinabove set forth, and in said answer pleaded specially adopted as part of relator's petition, said entire proceeding is null, void, and unconstitutional, [1365] and all further action therein should be stayed, and said judge restrained and prohibited from further proceeding therein, and prohibited from inflicting the threatened penalty. Relators annex and make part of this petition a certified copy of the rule, answer, and judgment rendered therein embodied in Exhibit A and filed herewith.

"Relators show that they are without remedy except by means of the writs of *certiorari* and prohibition in the premises, to be issued by this honorable court in the just and constitutional exercise of its supervisory power over the judges of said civil district court.

"Wherefore, the subjoined affidavits considered, relators pray that writs of *certiorari* and prohibition issue herein, directed to the Hon. F. A. Monroe, judge presiding over Division 'C' of the civil district court, parish of Orleans, commanding a record or transcript of all proceedings had, papers filed and action thereon, to be produced in this honorable court, in the matter of the proceedings for contempt, as in the foregoing petition set forth, against relators; that a writ of prohibition issue, and, after due proceedings, said writ be made peremptory and perpetual, and all proceedings under said rule for contempt had against these relators, as in the petition set forth, be declared absolutely null and void and set aside, and all further proceedings thereunder perpetually stayed and prohibited; and relators pray that pending this proceeding a restraining order issue, staying and prohibiting all further orders and proceedings in the premises until the final determination of the cause."

Accompanying the petition, as was stated therein, were copies of the article published in the *Times-Democrat* which gave rise to the proceedings (Exhibit "A") and of the judge's action taken at the hearing (Exhibit "B"). We insert the latter as part of the petition, but omit the former as its consideration has become unnecessary under the conclusions reached by this court.

"EXHIBIT B.

"*Civil District Court for the Parish of Orleans.*

"Tuesday, the 21st day of March, 1893. Present, the Hon. Francis A. Monroe, Judge.

"PETER FABACHER,
"*vs.*
"BRYANT AND MATHERS. } No. 35,549.

"In the matter of the rule herein taken upon the Times-Democrat Publishing Company, through its manager, Page M. Baker, and its 1256 president, Ashton Phelps, to show cause why said manager and president should not disclose to the court the party at whose instance a certain article which appeared in said *Times-Democrat* newspaper on Sunday, March 19, 1893, concerning the case in which said rule is taken and which is now on trial before a jury in this court, was published, and from whom the information contained in said article was obtained, and whether said article was paid for, and if so by whom, or in default thereof why they, the defendants in rule, should not stand committed for contempt of this court; said defendants having appeared in person and through their counsel, and having made the disclosures asked for in said rule.

"And the court having heard evidence and argument, and being satisfied therefrom that said publication was the voluntary act of said Times-Democrat Publishing Company, for which said company and its officers are alone responsible, and the question being then submitted to the court by the counsel for the plaintiff and for the defendants respectively, whether said company was guilty of contempt of court in publishing said article, and the court finding the law and the evidence to sustain the affirmative of this proposition, and for the reasons orally assigned in open court, it is ordered that the Times-Democrat Publishing Company and Page M. Baker, manager of said company, be adjudged guilty of contempt of the authority of this court in authorizing, publishing, and circulating in a newspaper published and circulated within the jurisdiction of this court an article the tendency and effect of which is necessarily to influence and forestall public opinion and the verdict of the jury on the case now being tried.

"And the court reserves its decision as to the penalty to be imposed for said contempt."

Alternative writs having issued as prayed for, the judge of division "C" filed a return or answer, in which he declared for cause why the writ of prohibition should not issue; "that when the rule for contempt referred to in relators' petition was called for trial the relators, as defendants in said rule, being personally present announced, either personally or through their counsel, their readiness to go to trial, as respondent supposed, upon the merits, and without objection that was heard by respondent to the form of proceeding; that the return to said rule was made orally, and the written return, which now forms part of the record, was filed by permission at a later date, and it was only 1257 after said rule had been disposed of, and, upon inspecting said written return, or a copy thereof, that respondent learned that said defendants objected to the form of the proceeding. Should it be the case that said objection was made at the trial, and upon this point he was entirely willing to abide by the recollection of counsel for relators, then he averred now, as he would have ruled then, that the proceeding by rule was competent and proper, and upon this point he invoked the opinion of the court." Further answering, he averred "that the civil district court, of which he was the judge, was a court of record and of general jurisdiction, civil and probate; that said court was established by, and derived its powers directly from, the constitution of the state, and that it became possessed, at the moment it was called into existence, and without express grant, of such powers, with respect to questions of contempt, as might be necessary for the proper and effective exercise of the jurisdiction directly conferred upon it; that the constitution conferred upon the legislature, by express grant, authority to limit the power of the courts to punish for contempt, but did not confer authority upon that branch of the government to divest the courts of such power, or even limit it to the extent of impairing the efficiency of the courts, nor had any such attempt been made; that no complaint was made that it was the intention of respondent to impose any penalty upon relators not authorized by statute, nor had he any intention to do so; that it was not claimed that the civil district court was without jurisdiction in the suit of *Peter Fabacher* v. *Byrant and Mathers*, for interfering with the trial of which relators had been adjudged guilty of contempt; that it was a civil action for the recovery of a sum of money exceeding one hundred

dollars between citizens of New Orleans, of which said court was fully seised of jurisdiction *rationæ materiæ* and *rationæ personæ*, and said suit was in course of trial before a jury in said court; that the finding of said court, as contained in the judgment, sets forth that the defendants in rule were guilty of contempt in authorizing, publishing, and circulating in a newspaper published and circulated within the jurisdiction of the court, an article, the tendency and effect of which was necessarily to influence and forestall public opinion, and the verdict of the jury in the case then being tried, viz: the case of *Fabacher* v. *Bryant*, and it was submitted on the authority of *State* v. *Houston*, 35 La. Ann. 1194, 1195, and *State* v. *Judge*, 40 La. Ann. 434, that the supreme court should inquire no further. But should the [1258] court decide to pursue the inquiry, as suggested in relator's petition, then it was submitted:

1. "That the civil district court, as a court of record and of general jurisdiction, had the inherent power to punish all contempts, and that so far from attempting to limit such power to particular cases, the legislature had distinctly affirmed it with respect to all, and had limited only the penalty to be imposed: Code of Practice, arts. 130, 131.

2. "That a publication in a newspaper, published and circulated within the jurisdiction of the court, calculated to 'prejudice mankind,' and to influence the verdict of a jury in a cause pending before such court and jury, was a contempt."

Respondent next proceeded in his answer to argue in favor of the correctness of these two propositions.

It will be noticed that whilst relators were called into court to show cause why they should not disclose to the court the party at whose instance was made a certain publication, which had appeared in the *Times-Democrat* newspaper, and from whom the information therein contained was obtained, and whether the said publication was paid for, and, if so, by whom, or, in default thereof, to stand committed for contempt of the authority of the court, relators were declared by the court (in what is termed the judgment of the court) guilty of contempt "in authorizing, publishing, and circulating in a newspaper published and circulated within the jurisdiction of the court an article the tendency and effect of which was necessarily to influence and forestall public opinion and the verdict of the jury in the case then being tried."

It will be further noticedthat the court declares that relators "had appeared in person, and, through their counsel, had made the disclosures called for," the logical result of which compliance on their part should have been their immediate discharge.

Instead of adhering to the issue apparently raised in their exception, that they could not be ruled into court for the purpose of creating and being punished for contempt for an act which they had not yet, but which they might possibly subsequently commit; in other words, contending that the act charged must have preceded, and not be one which would follow, the issuing of the rule, relators appear to have acquiesced both in the right of the court to require the particular disclosures demanded and in its right to proceed in the manner which it did. Not only this—they have ignored the fact that the 1259 court has pronounced them guilty of contempt for an act separate, distinct, and entirely different from that which was made the subject of possible complaint in the rule, and they do not claim that on compliance with the requirements of the rule it should have been discharged.

The district judge in his judgment says that on trial of the rule the counsel for the plaintiffs and defendants respectively submitted to the court whether the Times-Democrat Publishing Company was or was not guilty of contempt in publishing the article, and finding that the law and the evidence sustained the affirmative of that proposition, he adjudged the Times-Democrat Publishing Company and Page M. Baker, manager of that company, guilty of contempt of the authority of his court in so doing.

Relators in their brief say "they are the responsible agents for the *Times-Democrat* newspaper, and about to be punished for a contempt for publishing, pending trial, the article annexed to relators' petition, which the respondent judge held to be an act 'interfering with the trial of the cause,' and a publication tending to prejudice mankind in regard to judicial investigations pending before him, and especially as tending to influence the verdict of a jury in a cause pending, and therefore a contempt of court, and punishable as such; that it was not contended or found that the article contained any thing that is offensive *per se* or a libel, an insult, or any reflection on the court, its officers, the jury, or any person or instrumentality whatever called into action in the progress of the trial or the impartial administration of justice; that no

objection was made or urged to the form of proceedings; that any wording or phraseology in the 'written return' to 'the rule for contempt' must be and were intended to be construed with reference to the substantial defense of want of jurisdiction and power in the premises to punish as for contempt the act as charged on the face of the papers. It is a plea to the jurisdiction and an exception of no cause of action. It is not intended to raise a question as to the manner in which the defendants were brought into court."

They then proceed to argue what they claim to be the issues before this court, saying that "the first and controlling issue in the case is the immunity claimed under the constitutional guarantee of the 'freedom of the press,' and that the next suggests the inquiry of the limit of exclusive power of the trial court, or, in other words, [1260] what issues of law or fact will this court review or control under the supervisory power which it exercises by virtue of article 90 of the constitution in a contestation of this kind."

It would appear that all parties in the lower court consented to look to the recitals which preceded the "ordering" part of the rule and not to the "ordering" part itself as fixing the issues of the case, and that it was tried from that standpoint. We greatly disapprove of this departure from the actual pleadings in a matter in regard to which we are called upon to exercise our supervisory powers. The actual contention of the respective parties become uncertain, and such consent proceedings almost always result in a looseness of practice difficult to be dealt with properly.

We understand the relators to have contended in the lower court, as they do here—

1. That under the constitutional guarantees of the freedom of the press, the publishers of newspapers generally are secured from liability for contempt of court for articles published in them in the usual course of the business of printing the daily newspaper as an item of news giving an account of judicial proceedings had in open court, the right to do so being privileged and secured under express constitutional provisions in this state, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of any publication.

2. That the civil district court, though created by the constitution, is an "inferior court," and as such has not at common law power to punish for a constructive contempt; that

its power is limited to the cases embraced in articles 130 and 131 of the Code of Practice, the first of which declares that "all judges possess the power necessary for exercise of their respective jurisdictions though the same be not expressly given by law," and the second that "the judges of the supreme, district, and parish courts have the power to punish all contempts of their authority by fine not exceeding fifty dollars and imprisonment for a period not exceeding ten days for each offense of that kind," and that the power there conferred is limited to do that which is "necessary" for the exercise of the court's jurisdiction.

1261 3. That if a newspaper be liable for contempt for a publication, the matter published must be so direct in its intent and effect as to come within the class of contempts consisting of disobedience to, or interference with, orders, or otherwise directly obstructing the court in the exercise of its functions; that if the publication embodies general comment only, without manifest intent to hinder or interfere, and especially without intent to interfere, with the trial in a particular manner, it does not constitute a contempt even at common law, and if it might be so held, it is in this state and country invested with immunity by constitutional provisions in regard to the freedom of the press; that the particular article in question was not of such a character as has just been described as furnishing a ground for and was not a contempt.

4. That the article in question not being of such a character, the district court was without power or authority to declare or deal with it as such, and under our supervisory powers we are authorized through writs of prohibition and *certiorari* to review and undo the action of the lower court in that respect as an absolute nullity.

We shall deal with the propositions submitted a little out of their order, taking the second one first, as it strikes at the power and authority and jurisdiction of the lower court.

The civil district court is a court of record of original general jurisdiction, and if a direct legislative grant from the legislature were necessary in this state to confer upon it such powers as have been usually held to be inherent in all such courts it will be found in article 130 of the Code of Practice. That article pointedly recognizes and declares the existence in courts of all the powers necessary for the exercise of their respective jurisdictions, inherently and independently of ex-

press law, and by necessary implication it gives legislative sanction to the exercise of such powers, and the particular power of the district courts to punish for contempt was (as if to place that matter beyond the possibility of dispute) specially mentioned in article 131. That article is general in its terms, save as to the punishment to be inflicted, and is no limitation upon the article which precedes it except in that respect. Article 130 recognizes the existence of all the powers necessary to the jurisdiction without attempting to define what such powers are or should be. The word "jurisdiction" in the article is used in a broad, not a restricted, sense, and means every thing necessary for the maintenance of rightful power and authority.

1262 The statutes of the state are enacted not simply for the defining of rights and obligations, but for their protection and enforcement, and the very object of the organization of courts is through their instrumentality to make certain that justice should be administered by due process of law without denial or unnecessary delay, and with strict impartiality. The purpose of their creation would be crippled and defeated if they were to be unable of themselves, in cases pending within their jurisdiction, to guard the pure and unbiased administration of justice. It is no less the duty of the courts to see that the law be faithfully applied in cases before them, than it is the duty of the executive to see that the laws should be generally executed. Brown in his work on Jurisdiction, section 115 *a*, says that "the power to punish for contempts is inherent in all courts; that its existence is essential to the preservation of order in judicial proceedings." If this inherent power exists for the preservation of mere order, for how much greater reason should it exist to protect the fountains of justice from being poisoned and the courts themselves from being brought into contempt and disrepute.

The supreme court of Mississippi remarks on the power to fine and imprison for contempt that "from the earliest history of jurisprudence it has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees, would be a disgrace to the legislation and a stigma upon the age which

invented it. In this country all courts derive their authority from the people and hold it in trust for their security and benefit": Wells on Jurisdiction, 179; *Watson* v. *Williams*, 36 Miss. 341. In the correctness of these views we fully concur.

We are of the opinion that the civil district court, a court of record having original general jurisdiction, is not an "inferior court" in the technical sense of that term; that it has the power and authority to punish for contempts of court; that though the proceedings in matters of constructive, differ from those of actual, contempts, the power of the district court under proper proceedings extends to both.

The claim of the relators that, under the constitutional guarantees [1263] of the freedom of the press, "publishers of newspapers are secured from liability for punishment as for contempt of court for articles published in the usual course of the business of printing the daily newspaper as an item of news giving an account of judicial proceedings had in open court, the right to do so being privileged and secured under express constitutional provisions in this state, subject only to liability or responsibility in damages to any and all persons who might suffer pecuniary or other loss in consequence of any publication," is not true as a general proposition.

The general rule as stated by Wells (Wells on Jurisdiction, 191) is that "where a publication being read by jurors and attendants on the courts would have a tendency to interfere with the proper and unbiased administration of the law in pending cases it may be adjudged a contempt, and accordingly punished."

Where an article of that character has been published it is a great mistake to suppose that the resulting liability or responsibility is limited to a civil action for damages by the individuals who might be prejudiced thereby. Irreparable injury not to be compensated by money would make such a limited remedy totally inadequate to meet the requirements of the situation. Such a contention ignores totally the consideration of the question as affecting the public morals and public interests.

Relators, themselves, in their brief, admit the incorrectness of the broad proposition advanced, for they say: "That a contempt may be committed by publication, notwithstanding the guaranteed 'freedom' of the press is conceded, but there must be somewhere a limit to the power of the courts in that regard, and as the limit must be found by determining the

scope and significance of the constitutional provision, it cannot be an arbitrary one, resting solely on the discretion of the particular judge in each case. There is a rule of limitation to be deduced; it is the function, the duty, the high privilege of the court of last resort to find and establish it."

This statement is an abandonment of the claim that all publications of judicial proceedings in newspapers are privileged, viewed from the standpoint of "contempt proceedings," and the substitution in lieu thereof of the contention that some publications are so privileged. If some be not so protected, it necessarily follows that when a particular article is charged as being of the latter kind the court to 1264 which such a question is submitted must examine and determine the character of the publication.

Such an examination would often carry with it the investigation of and application of facts to the particular case, and a denial of the correctness of the conclusions reached in the matter by the judge would not extend to a denial of the power to determine; this power would be admitted, the proper exercise of the power would be alone at issue.

The third and fourth contentions of the relators may be considered together. They claim that in this particular case the article published in the *Times-Democrat* which gave rise to these proceedings was not such an article as could be made the basis for a contempt of court, and that this being the case this court in the exercise of its supervisory powers can review the judgment of the district court pronouncing otherwise—that it can and should set aside that judgment as being null and void.

That this court under some circumstances has the authority under its supervisory powers to review and annul, under writs of prohibition and *certiorari*, the action of a district court in ordering the imprisonment of the publishers of a newspaper on a charge of contempt of his court is undoubted. The case of the *State* v. *Judge*, 34 La. Ann. 741, was of that character, but it was one differing radically from that before us. The question of the freedom and liberty of the press was there presented, but under an entirely different state of facts. The *syllabus* of the case concisely states the points raised and determined as follows:

"By our bill of rights the 'press' is free from all censorship of what shall be published and entirely exempt from control

in advance as to what shall appear in print. Courts in this state are therefore absolutely without authority to control in advance or to restrain by injunction the liberty enjoyed by the 'press' to publish even what may be of a libelous nature, the party injured having his remedy after the publication.

"The court having no power to grant such an injunction it was an absolute nullity, and the condemnation for contempt falls with the injunction the moment such nullity has been pronounced by this court, which has supervision in cases like the one at bar."

The doctrine there stated was unquestionably correct, but the court was very careful to say in the body of its decision: "We are to [1265] construe and give effect to our provision precisely as if it declared, in the language of the constitution of Minnesota, 'the liberty of the press shall forever remain inviolate, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such right.'"

It was precisely the abuse of the right which was charged in the present case against the defendants.

When that charge was made, the article complained of was presented to the court as a piece of evidence in the case in connection with testimony adduced, and upon the evidence as a whole the court adjudged relators guilty. As the subject matter before the court was within its jurisdiction, as some publications were liable to be adjudged an abuse of the liberty of the press and some not—as the conclusions to be reached in the case were dependent upon the evidence to be submitted, and the case was so decided, this court is not to go behind the judgment and inquire into its correctness on that evidence.

Relators, in their brief, say of their exceptions: "It is a plea to the jurisdiction and an exception of 'no cause' of action."

The jurisdictional point was not well taken, and the ruling upon the exception of "no cause of action" is not reviewable in this proceeding: *State* v. *Fournet*, 45 La. Ann. 943; *State* v. *Judge*, 40 La. Ann. 434; *State* v. *Judge*, 35 La. Ann. 1197; *State* v. *Houston*, 35 La. Ann. 1194.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the provisional writs issued herein be set aside and relator's demand and application be rejected and dismissed at their costs.

Mr. Justice PARLANGE takes no part.

Rehearing refused.

CONTEMPT—JURISDICTION OF COURTS TO PUNISH FOR.—Courts have the inherent power, in the absence of constitutional limitation upon their powers, to punish as a contempt any act, whether committed in or out of their presence, which tends to impair, embarrass, or obstruct them in the discharge of their duties: *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78, and note.

CONTEMPT.—PUBLICATION OF JUDICIAL PROCEEDINGS: See the extended note to *State* v. *Galloway*, 98 Am. Dec. 419. Also the case of *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78.

CONTEMPT.—PROCEEDINGS IN WHETHER REVIEWABLE: See the extended note to *Mullin* v. *People*, 22 Am. St. Rep. 417–426.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

MERCANTILE NATIONAL BANK *v.* PARSONS.

[54 MINNESOTA, 56.]

TRUSTS—DEEDS TO ONE "AS TRUSTEE" WITHOUT NAMING OBJECT OF THE TRUST.—While the fact that a grantee in a deed is described as "trustee" gives no notice of the name of the beneficiary or of the character of the trust, yet it imposes the duty of inquiry as to its character and limitations upon a party who takes title under the deed; but all that is required of him is good faith and reasonable care in following up the inquiry which the notice given him suggests.

NOTICE—DUTY TO INQUIRE.—Whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of every thing to which that inquiry would presumably have led.

CORPORATIONS—KNOWLEDGE OF STOCKHOLDER AS NOTICE TO.—To render the knowledge of individual corporators the knowledge of the corporation it must be the knowledge of all the corporators.

ACTION to foreclose a mortgage. Some time after October 20, 1890, and before January 17, 1891, the plaintiff bank loaned the defendant, the Lake Erie Tobacco Company, seventeen thousand five hundred dollars, and took six notes therefor, indorsed by the defendant Parsons. On maturity such notes were presented for payment, but not paid, and were then protested and notice given to Parsons. Plaintiff claimed as security the Beard block in Minneapolis for the payment of the notes, and brought action of foreclosure, to obtain a sale and have the proceeds applied in payment of the debt. Another defendant, the South Market Company, appeared in the action claiming to own the Beard block, and denied that plaintiff had any mortgage thereon. On the trial, judgment was rendered against plaintiff and in favor of the South Market Company. Plaintiff's motion for a new trial was deni d,

and it appealed. On July 19, 1888, the Cleveland Farming Company had a capital stock of two hundred and fifty thousand dollars, divided into shares of one hundred dollars each. Two hundred of these shares were owned by undisclosed parties. The balance was owned by defendants H. P. Crowell, T. P. Handy, and J. B. Parsons, in equal proportions. On that day the Cleveland Farming Company exchanged with one Fletcher a farm in Dakota for the Beard block. By consent of the Cleveland Farming Company the title to the Beard block was conveyed to the defendant "Crowell, trustee." This conveyance did not disclose the trust nor the beneficiary, but it was in fact intended to be in trust for the farming company. September 18, 1888, Crowell and wife executed a declaration of trust, stating that this Beard block, standing in his name as trustee, was owned by said Handy, Parsons, and himself in equal parts, each owning one-third; and that he would on demand convey to each a third interest therein. This instrument was not recorded. December 14, 1888, Parsons showed this instrument to the plaintiff and gave it a deed to his interest in the property as security for his indebtedness and that of the Lake Erie Tobacco Company. Crowell acknowledged notice of this deed upon its face, and agreed to be governed accordingly. This deed was recorded December 19, 1888. On December 5, 1890, Crowell, with the consent of the Cleveland Farming Company, conveyed the entire property to the South Market Company, subject to two mortgages for seventy-five thousand dollars, which said company agreed to pay said company, whose capital stock amounted to five hundred thousand dollars, gave to Crowell, Parsons, and Handy two hundred thousand dollars thereof for the Beard block property, subject to such mortgages. The South Market Company had notice, before its purchase, that Crowell held the title to the property as trustee for the farming company, and procured the consent of the officers of the latter corporation to the sale. The South Market Company had no notice of plaintiff's claim until November, 1891.

Munn, Boyesen, and Thygesen, and J. M. Gilman, for the appellant.

Benton, Roberts, and Brown, Frank Healy, and A. T. Brewer, for the respondents.

[1] MITCHELL, J. While some of the findings of fact and conclusions of law of the trial court are probably erroneous,

yet, in view of other facts found, these are not material, for, in our judgment, the whole case comes down to the single question whether the South Market Company was a purchaser in good faith, for value, without notice of plaintiff's mortgage.

The deed of the property from Fletcher having been taken in the name of Crowell, with the knowledge and consent of the Cleveland Farming Company, no enforceable trust in its favor resulted from the fact that it paid the consideration: Gen. Stats. 1878, c. 43, sec. 7.

It may be that the property would have been charged with a constructive trust in favor of the creditors of the company, but [62] that is a question between them and Crowell, which is not involved in this suit.

The fact that Crowell was designated "trustee" in the deed, without naming the beneficiary, or stating the nature of the trust, was, of course, insufficient to create any trust; and it can hardly be necessary to suggest that a trust could not be ingrafted on to this conveyance by parol evidence: Gen. Stats. 1878, c. 41, sec. 10.

Hence the testimony of Crowell that he held the land in trust for the farming company was incompetent, and, even if admitted without objection, proved nothing.

Hence, under the deed from Fletcher, Crowell was, as against the farming company, the absolute owner of the property. But we fail to see why his subsequent declaration of trust in favor of Parsons and Handy was not valid, and did not establish an enforceable trust as against him or any one purchasing from him with notice of it. It is not important whether Crowell received any consideration for this declaration of trust. He had a right to give away his property if he saw fit. If he received no consideration, then it stood as an executed gift, and, as it seems to us, the trust became a mere passive one, which vested in Parsons and Handy each the legal title to one undivided third of the property.

But whether they took a legal or only an equitable title is immaterial, for an equitable interest is mortgageable equally with a legal one. Nor is it at all material that plaintiff did not know of this declaration of trust when it took its mortgate from Parsons. If it took the mortgage without examining the title the mortgage nevertheless covered whatever interest Parsons in fact had in the premises. Hence plaintiff's mortgage from Parsons was valid as between the parties,

and will take priority over the subsequent conveyance from Parsons to the market company, unless the latter is protected as a purchaser in good faith for value whose conveyance was first recorded. The record of the mortgage from Parsons to plaintiff, without the record of the declaration of trust by Crowell in favor of Parsons, would not be constructive notice to any subsequent purchaser from Crowell, because not in the chain of title; and, as this declaration of trust was not recorded, the case comes down to the question whether the fact that Crowell was, in the deed from Fletcher, described as "trustee," was sufficient to put [63] the market company on inquiry, and, if so, whether the investigation it made and the information it received was such as a reasonably prudent man would have acted on without further inquiry. It is a familiar doctrine that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title; and while the word "trustee" in a deed gives no notice of the name of the beneficiary, or of the character of the trust, yet it does give notice of a trust of some description, which imposes the duty of inquiry as to its character and limitations; and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of every thing to which that inquiry would presumably have led.

But the court finds that the market company, before and at the time of the conveyance to it by Crowell, was informed by Crowell that the farming company had paid the entire consideration for the property so conveyed to him, and that he then held the title thereto in trust for the use and benefit of the company, and that he was disposing of the property for the purpose of closing up its business; that in reliance upon such notice, and believing the fact to be that the farming company was desirous of disposing of the property by and through Crowell, then holding the title thereto for such purposes, the market company purchased and paid for the property. We have carefully examined the evidence, and are fully satisfied that it abundantly justified these findings. In fact, the testimony of Crowell and of Benton (who, as its president, transacted the business in behalf of the market company) to that effect stands uncontradicted.

The facts thus found constituted due diligence in following up the inquiry suggested by the word "trustee" in the deed, and the information received was, under the circumstances, such as to render it unnecessary, in the exercise of reason-

able care, to make further inquiries as to the possible rights of any one, at least other than of the farming company.

As the deed gave no indication as to who the possible beneficiary was, the only persons of whom inquiry could or would naturally be made were the grantor and the grantee. If Fletcher, the grantor, had been inquired of, presumably the market company would have been informed, as the facts were, that the consideration was paid $64 by the farming company, and at its direction the deed made to Crowell. There is nothing, however, to suggest that Fletcher knew of the subsequent declaration of trust by Crowell in favor of Parsons and Handy. The other person of whom inquiry could be made was Crowell, who made a statement of the situation, which, especially, in view of the fact that the farming company had paid the consideration for the property, was reasonable and natural, and one upon which a prudent man would have been justified in acting without inquiry whether possibly some one other than the farming company might not be the beneficiary. Under the circumstances, the conclusion at which any one would naturally have arrived would have been that, for convenience, the title had been put in Crowell, in trust (perhaps not enforceable, because not in writing) for the farming company, which paid the consideration; and it can make no difference whether the information was given by Crowell in response to inquiry, or volunteered to induce the market company to make the purchase. And while it is true that the possibility that a false or incompetent answer may be given, is no excuse for not making inquiry, yet a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry. All that is required of a party who is put upon inquiry is good faith and reasonable care in following up the inquiry which the notice given him suggests. As the information given by Crowell suggested an interest in the property on the part of the farming company, it is quite possible, had there existed an enforceable trust in favor of that company, and its limitations and restrictions had been such that Crowell had no power to convey, that, as to the farming company, the market company would have been chargeable with notice of these facts, of which presumably the latter would have been informed upon further inquiry of the former. But there was nothing in the information received of Crowell that would have suggested to any man of ordinary prudence that

Parsons or Handy individually had any interest in the land, especially as they themselves were promoting and negotiating for this very conveyance by Crowell to the market company. The court also finds that the market company never had any knowledge or information of any character of the existence of this declaration of trust until November, 1891—nearly a year after its deed from Crowell was executed and recorded.

[65] As applied to Benton, its president, who transacted the business in its behalf, this finding is unquestionably justified by the evidence. Counsel for plaintiff claims that Benton was chargeable with actual notice, because this declaration of trust and the mortgage from Parsons to plaintiff were contained in an abstract of title of the property which he had procured, and which he did not, but ought to have, examined. We do not see that one who obtains an abstract of title, and then buys, without examining it, is in any worse position than one who buys without obtaining an abstract at all. But we do not understand the evidence as counsel seems to. We understand Benton's testimony to refer to the abstract brought down to the date of the conveyance by Fletcher, and not to the one brought down to the fall of 1891, after he learned of the claim of the plaintiff. Moreover, the declaration of trust could not have been on any abstract at the time of the conveyance to the market company, for it was not on record.

It is also claimed that the market company is chargeable with notice of plaintiff's rights, because Crowell, Handy, and Parsons had actual knowledge of them, and that as they were corporators of the market company, their knowledge was its knowledge. Had these three constituted all the corporators of this company, there might have been some thing in this point, and that is as far as any authority cited by plaintiff goes. But in this case there were other corporators, who were taking and paying for stock in the corporation, who had no such notice. Generally, and for most purposes, a corporation is a legal entity distinct from the body of its stockholders; and, in any event, to render the knowledge of the individual corporators the knowledge of the corporation it must be the knowledge of all the corporators.

The suggestion that the market company was not a purchaser for a valuable consideration is without merit. The issuing of paid-up stock of the corporation in payment of the property of itself constituted a valuable consideration.

Order affirmed.

TRUSTS—NOTICE OF.—The addition of the word "trustee" to the name of a person is notice of a trust, and calls for inquiry and examination: *Marbury* v. *Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467, and note.

CORPORATIONS.—KNOWLEDGE OF ONE STOCKHOLDER is not notice to the company unless communicated to the board of directors: *Wilson* v. *McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347. See, also, the extended note to *Bank* v. *Whitehead*, 36 Am. Dec. 199.

NOTICE—PUTTING ON INQUIRY.—One is chargeable with actual notice of facts if he has knowledge of such facts as would lead a prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence, would have given him knowledge of the facts with notice of which he is sought to be charged: *Knapp* v. *Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Fresno Canal Co.* v. *Rowell*, 80 Cal. 114; 13 Am. St. Rep. 112; *Robinson* v. *Crenshaw*, 84 Va. 348; *Tucker* v. *Constable*, 16 Or. 407; *Wood* v. *Rayburn*, 18 Or. 3; *Slayton* v. *Singleton*, 72 Tex. 210; *Hoy* v. *Bramhill*, 19 N. J. Eq. 563; 97 Am. Dec. 687, and note; *Hood* v. *Fahnestock*, 1 Pa. St. 470; 44 Am. Dec. 147, and note; *Booth* v. *Barnum*, 9 Conn. 286; 23 Am. Dec. 339; *Lodge* v. *Simonton*, 2 Pen. & W. 439; 23 Am. Dec. 36, and extended note. See, also, the extended note to *State* v. *Mason*, 34 Am. St. Rep. 399, and the note to *Montgomery* v. *Keppel*, 7 Am. St. Rep. 129.

STATE *v.* KINMORE.

[54 MINNESOTA, 125.]

JURISDICTION—INSUFFICIENCY OF PETITION.—The probate court cannot acquire jurisdiction to proceed against a child or its natural or legal guardian for the purpose of committing it to the state public school when the petition or application upon which the proceeding rests is wholly inadequate and insufficient.

HABEAS CORPUS—ATTACK ON JURISDICTION BY.—The jurisdiction of the tribunal whose judgment is involved over the person detained and the subject matter may be inquired into at all times on *habeas corpus*, though mere irregularity, informality, or error cannot be.

HABEAS CORPUS—JURISDICTION.—To bar an application by *habeas corpus* for discharge from arrest, by virtue of a judgment or decree or execution thereon, the court in which the judgment or decree was given must have had jurisdiction to render such judgment.

HABEAS CORPUS—WHAT MAY BE INQUIRED INTO BY.—The writ of *habeas corpus* cannot have the force and operation of a writ of error or *certiorari* or appeal, nor is it designed as a substitute for either. It does not deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void.

Wheelock and Sperry, for the appellants.

C. W. Main and G. W. Somerville, for the respondent.

[126] COLLINS, J. This is a *habeas corpus* proceeding, brought before us on appeal by respondent from a judgment entered in district [127] court awarding the custody of the

child in question to the relator, its father. From the return made to the writ of *habeas corpus*, and from the record of the proceedings had in the court below, it appears that in the year 1892 the child had been received into the state public school at Owatonna in accordance with the provisions of Laws 1885, chapter 146, as amended by Laws 1889, chapter 167, and had then been transferred to respondent's family, as authorized by section 13 of said chapter 146. It is disclosed that the steps which led to the placing of the child in the public school were initiated by the filing with the probate judge of Lyon county of an application or petition signed by two of the commissioners of said county, in which they stated that "Jessie Rea, a female child between two and fourteen years of age, a resident of said county, is, in their opinion, a child belonging to one of the classes enumerated by the statutes of the state of Minnesota as admissible to the state public school, and is sound in body and in mind, and is entitled to admission into said state public school; and we do request an examination of said child by said court as to such alleged condition, and should said child be found by said court to belong to one of the classes enumerated by the statutes as admissible to said state public school, that an order be made declaring said child to be in said alleged condition, and that she be sent to and admitted into the state public school, according to law." Attached to this was the written consent of the mother of the child that the application or petition be granted. We have quoted this document in full, that it might be readily seen how defective it was in the essential things required to be stated under the provisions of Laws 1889, chapter 167, section 11. Evidently the statute contemplates that the commissioners shall state that the child named by them is dependent upon the public for support, or that it is in a state of habitual vagrancy or mendicity, or that it is ill treated, and in peril of life, health, or morality, by continued cruel personal injury, or by the habitual intemperance or grave misconduct of the parents or of the guardians. The application or petition in question is otherwise open to criticism, but we do not hesitate to say that when such a document contains nothing more specific in reference to the situation or condition of the child named than did the one at bar it is inadequate, and insufficient upon which to act. The probate court cannot thus acquire jurisdiction [140] to proceed against the child or its

natural or legal guardians. The defect is not mere irregularity or informality, but is wholly jurisdictional.

It is argued that, as the child was received by the school officials, and detained by the respondent by virtue of the final judgment of a competent tribunal having jurisdiction of the subject matter, the writ of *habeas corpus* is not available, because of the provisions of the General Statutes of 1878, chapter 80, section 22. Statutes similar to our own, relating to what may be inquired into under this writ, have often been construed by the courts. The broad current of numerous decisions will go to show that the jurisdiction of the tribunal whose judgment is involved over the person detained and the subject matter may be inquired into at all times, on *habeas corpus*, though mere informality, error, and irregularity cannot be. To bar the applicant from a discharge from arrest by virtue of a judgment or decree or execution thereon, the court in which the judgment or decree was given must have had jurisdiction to render such judgment. It matters not what the general powers and jurisdiction of a court may be. If it act without authority in the particular case, its judgments and orders are mere nullities; not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right: *State* v. *West*, 42 Minn. 147; *Elliott* v. *Peirsol*, 1 Pet. 328; *People* v. *Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211. But the writ of *habeas corpus* cannot have the force and operation of a writ of error or *certiorari* or appeal, nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void. A distinction between a proceeding or judgment which is void and one that is voidable only, for error, is recognized in the cases, and must be observed: See *State* v. *Sheriff of Hennepin County*, 24 Minn. 87; *In re Williams*, 39 Minn. 172. Nothing more need be said in order to sustain the judgment appealed from, which is affirmed.

VANDERBURGH, J., took no part herein.

HABEAS CORPUS—ATTACK ON JURISDICTION BY.—On *habeas corpus* only jurisdictional defects are available: *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *In re Morris*, 39 Kan. 28; 7 Am. St. Rep. 512; *In re Latta*, 43 Kan. 533; *Ex parte Degener*, 30 Tex. App. 566. *Habeas corpus* may be maintained for relief against a criminal judgment void for want of jurisdiction: *In re Perustick*, 3 Wash.

672; 23 Am. St. Rep. 80, and note. See the extended note to *Mullin* v. *People*, 22 Am. St. Rep. 422; *Commonwealth* v. *Lecky*, 26 Am. Dec. 40, and *Morrill* v. *Morrill*, 23 Am. St. Rep. 110.

HABEAS CORPUS—WHAT MAY NOT BE REVIEWED ON.—*Habeas corpus* will not lie to correct errors of trial courts, and cannot be substituted for appeals and writs of error: *Ex parte Mitchell*, 104 Mo. 121; 24 Am. St. Rep. 324, and note; *In re Black*, 52 Kan. 64; 39 Am. St. Rep. 331, and note. See, also, the extended notes to *Commonwealth* v. *Lecky*, 29 Am. Dec. 40; *Morrill* v. *Morrill*, 23 Am. St. Rep. 108, and the notes to *Ex parte Sternes*, 11 Am. St. Rep. 255, and *In re Morris*, 7 Am. St. Rep. 515.

APPLEBY *v.* ST. PAUL CITY RAILWAY CO.

[54 MINNESOTA, 169.]

STREET RAILROADS—NEGLIGENCE—WRONGFUL EXPULSION OF PASSENGER.—Though a street-car conductor in ejecting a passenger from a car may have done only what was apparently his duty, it does not follow that the company is not liable, if by its previous neglect of duty towards such passenger it has justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the company, should expel him for nonpayment of fare.

STREET RAILROADS—DUTY TO PASSENGERS.—It is the duty of a street-car company to give to its passengers such instructions or directions, as to its own system or course of conduct, as may be reasonably necessary to enable them to pursue their journey, and it is liable in damages for a failure to perform this duty resulting in injury to a passenger.

STREET RAILROADS—WRONGFUL EXPULSION OF PASSENGER.—A passenger on a street-car who has paid his fare and received a transfer entitling him to continue his journey by the next connecting car on another line of the same company, and who, after he has taken the connecting car and surrendered his transfer, is prevented from completing his journey by reason of the car being taken off the line, is justified in taking the next passenger car, when, in the absence of the conductor, he is informed by the driver of the car he has taken off that this is the proper course to pursue, and if such passenger is ejected by the conductor of the last car for want of a transfer and refusal to pay fare, he has a *prima facie* right against the company to recover for such expulsion.

Thompson, Gates, and Thompson, and C. J. Thompson, for the appellant.

McCafferty and Noyes, for the respondent.

169 DICKINSON, J. This action is for the recovery of damages for the forcible expulsion of the plaintiff from a street-car of the defendant on its Selby avenue cable line. At the trial the court dismissed the action, when the plaintiff rested his case. We shall only have to consider whether the evidence showed that the expulsion of the plaintiff from the car, in connection with the circumstances preceding it, was wrongful, so that the case should have gone to the jury.

Attention will be directed to what may conveniently be called two lines of street railway, connecting on Selby avenue at a cross street called Milton street. The westerly of these lines is operated by electric power; the easterly, or cable line, by a cable. The tracks of the two lines are continuous, but the cars of each line stop at Milton street; the passengers changing cars at that point, [170] which may be considered as the eastern end of the electric line, and the western end of the cable line. The cable line extends east from Milton street, along Selby avenue and other streets, to Broadway in the center of the city. The "power-house," so called, where is the machinery by which the cable line is operated, is some seven or eight blocks east of Milton street. Here, also, cars are housed and repaired. Passengers going east on the electric line pay their fare to the conductor on that line. This entitles them to transfer checks, as evidence of such payment, and upon transfer to the cable-cars such checks entitle the passengers to continue their passage over the cable line to its eastern end, at Broadway. Passengers are required, at the transfer point, to take "the next car departing on the connecting line upon which it [the transfer check] is to be used." The plaintiff boarded an electric car, going east, his destination being a point on the cable line east of the power-house. He paid his fare, and received a transfer check. When the car arrived at the transfer place at Milton street a cable-car was there, just about to start, going east. The plaintiff, with other passengers, got on it, and forthwith proceeded eastward. The conductor took up the transfer checks. At the power-house the car stopped, and was taken off the line, and run into the building; for what reason or purpose does not appear. It does not appear that this was a usual proceeding, or that the passengers were in any manner notified that the car was not to go over the line to its end. Indeed, the only inference which can be drawn from the circumstances, as presented by the evidence, is that the plaintiff was justified in assuming that the car was to go over the line in the usual manner. His testimony is that he had no intimation to the contrary. When the plaintiff saw that the car was being taken off at the power-house the conductor had gone; and, upon inquiry addressed to the driver of the car, the latter told him he would have to take the next car, which was just then approaching from the west on the same line. The plaintiff did so. The conductor on that car demanded fare

from the plaintiff, although the latter explained the fact that his transfer ticket had been taken up by the conductor of the car that had just been taken off at the power-house. The plaintiff refusing to pay again, he was then forcibly put off.

171 The facts thus stated presented a case which would have justified a verdict for the plaintiff. He had paid the proper fare, and was entitled to ride on the cable line, to its end. It is to be kept in mind that the action is not against the conductor, for the expulsion, nor does the right of action rest upon the bare fact of the expulsion. The cause of action set forth in the complaint covers the whole transaction above stated; and the inquiry is whether, upon the whole case, the defendant appears to have neglected or violated its duty towards the plaintiff, to his injury. If it be said that, since the plaintiff could present no proper evidence of his right to ride, it was the duty of the conductor to put him off, it may be answered that the defendant, and not the plaintiff, may well be deemed at fault for that condition of things. That is one of the grounds upon which, in part, the defendant may be held responsible. Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty it does not follow that the defendant is not responsible therefor. It would be responsible if, by its previous neglect of duty towards the passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should expel him for nonpayment of fare: *Pine* v. *St. Paul City Ry. Co.*, 50 Minn. 144; *Murdock* v. *Boston etc. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307; *Lake Erie etc. Ry. Co.* v. *Fix*, 88 Ind. 381; 45 Am. Rep. 464, and cases cited; *Kansas City etc. R. R. Co.* v. *Riley*, 68 Miss. 765; 24 Am. St. Rep. 309; *Philadelphia etc. Ry. Co.* v. *Rice*, 64 Md. 63; *Chicago etc. R. R. Co.* v. *Griffin*, 68 Ill. 499. And under the circumstances the jury might have reasonably found that the defendant's conduct, through its agents, had justified the plaintiff in taking this car. The plaintiff, we repeat, was entitled to be carried over the cable line. He might presume that proper means, and a proper system or practice, had been provided for such service. He had done all that was required of him, at least prior to the time when he left the car taken off at the power-house to get on the other. It is the duty of the carrier to give to its passengers such instructions or direction, as to its own system or course of conduct, as may be reasonably

necessary to enable them to pursue their journey: *Dwinelle v. New York Cent. etc. R. R. Co.*, 120 N. Y. 172 117; 17 Am. St. Rep. 611. When it became apparent that the car was being taken off without previous notice, the passengers had a right to expect information from some one as to how they were to proceed on the journey. The conductor seems to have then disappeared, and when they were informed by the cardriver that they should take the next car they were justified in acting on that information. We do not decide whether they might not have done this without such direction. They are not presumed to have known that passengers from cars thus taken off were not allowed to resume the journey by the next passing car. It was the duty of the defendant to make some provision for them, and not only was this the course most naturally to be expected, but there seems to have been no other way provided, and the only way in which the plaintiff could avail himself of his right to be carried was to take the passing car, as he did do. The case is distinguishable from those where one enters a carriage, knowing that he is without such evidence of his right of passage as the reasonable regulations of the carrier require. In brief, it might have been found by the jury that the plaintiff was prevented from the enjoyment of his right to be carried, and was subjected to expulsion from the car, not by reason of any fault on his part, but by the fault of the defendant; and in such a case there would be a right of recovery. We are aware that our decision is not in apparent harmony with all of the authorities. Perhaps the seeming conflict of authority has resulted either from differences in the cases presented or in the different views taken as to the real causes of action relied on. A distinction is to be observed between cases where courts, whether justified by the pleadings or not, have regarded the right of action as resting upon the bare fact of expulsion by a conductor or agent whose duty (to the carrier) required him to expel the passenger, and cases like this, where, as we consider, the cause of action is the conduct or neglect of the defendant, which results in, and also includes, the expulsion. It follows that the court erred in dismissing the case. The plaintiff showed a right of action. We do not consider what the measure of his recovery may have been, for that is not here involved.

Order reversed.

RAILROADS—EXPULSION OF PASSENGERS.—Where a conductor under a mistake of facts or of judgment wrongfully ejects a passenger from a train the railroad company is liable: *Higgins* v. *Watervliet etc. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293; *Maples* v. *New York etc. R. R. Co.*, 38 Conn. 557; 9 Am. Rep. 434; *Lake Erie etc. Ry. Co.* v. *Fix*, 88 Ind. 381; 45 Am. Rep. 464; *Murdock* v. *Boston etc. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307; *Van Dusan* v. *Grand Trunk Ry. Co.*, 97 Mich. 439; 37 Am. St. Rep. 354, and note; *McKay* v. *Ohio River R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913, and note. See the extended note to *Commonwealth* v. *Power*, 41 Am. Dec. 476.

RAILROADS—PASSENGER'S RIGHT TO INFORMATION.—A passenger is entitled to all information requisite to enable him to pursue his journey with safety and dispatch. His duty is to make all necessary inquiries, and the corresponding duty of the carrier is to give the information desired: *Devinelle* v. *New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611, and note.

HARRIS *v.* JOHNSTON.

[54 MINNESOTA, 177.]

AGENCY—EXTENT OF AUTHORITY.—A formal instrument conferring authority upon an agent is strictly construed, and can be held to include only the powers expressly given, and such others as are necessary and essential to carry into effect those which are expressed.

AGENCY—POWER TO BIND PRINCIPAL JOINTLY WITH OTHERS.—The authority vested in an agent to bind his principal by a negotiable instrument, unless otherwise expressed, is authority to bind him separately, and not conjointly with another; in other words, power to an agent to act for his principal, in the absence of any thing to show a different intention, must be construed as giving authority to act in the separate individual business of his principal only.

POWER OF ATTORNEY—CONSTRUCTION.—Several and separate powers of attorney executed by each of several cotenants authorizing an agent to sell and execute warranty deeds of each cotenant's interest in the common property, and to "sell and indorse any promissory notes that may be taken and secured by mortgage," do not authorize such agent to bind either of his principals as indorser, jointly with the other cotenants, of a note taken payable jointly to them all.

ACTION on the following indorsement:

"For value received we hereby guaranty the payment of the within note at maturity, hereby waiving protest and notice of protest for nonpayment. Pay J. N. Harris or order.

"JOHN JOHNSTON, F. E. SEARLE,
"A. J. SMITH, A. R. BUSHNELL.
"Each by WM. M. BUSHNELL, their Attorney in Fact.
"WILLIAM M. BUSHNELL."

Judgment for plaintiff. Defendants appeal.

Lusk, Bunn, and Hadley, for the appellants.

S. E. Hall, and Young and Lightner, for the respondent.

[182] MITCHELL, J. The defendants in the record, Johnston, Smith, Searle, and the two Bushnells, being the owners as tenants in common of certain lands, each of them, other than William M. Bushnell, executed a separate power of attorney to William M. Bushnell. William M. Bushnell, for himself, and as attorney for the other defendants, under these powers, sold some of the land, and took as security for the purchase money (as we infer) the promissory note described in the complaint, payable to the order of all five of the defendants jointly, and subsequently sold and transferred it to plaintiff with what purported to be a joint "indorsement" or "guaranty" of all the payees. This action is brought on this indorsement or guaranty. The defense is that it was not authorized by the power, because—1. It is a contract of guaranty of payment, and not of "indorsement"; 2. The separate powers did not authorize the agent to bind either of the defendants jointly with the others; and 3. That the instrument was not a promissory note. The third ground has been decided adversely to defendants' contention, at the present term, in *Hastings* v. *Thompson*, 54 Minn. 184; *post*, p. 315. We do not find it necessary to consider the first, because, in our judgment, the second is decisive of the case. It is as fundamental as it is elementary in the law of agency that a formal instrument conferring authority will be construed strictly, and can be held to include only those powers which are expressly given, and those which are necessary and essential to carry into effect those which are expressed. While all these parties had an interest in the land, [183] the powers of attorney were several and separate, and authorized the sale and conveyance of the interest of each, and the disposition of the notes and mortgages taken for purchase money therefor separately, and not jointly, with the interest of the others. The authority in each instance was to convey by warranty deed the interest of the grantor of the power in the property. It could hardly be claimed that this would authorize the attorney to execute a joint deed in behalf of all the owners of the whole of any tract, so as to bind each by covenants of warranty of the title not only of his own interest, but also of the interests of his cotenants. So, too, with the authority to indorse notes "taken and secured by mortgages on any of said lots." This must be construed in connection with what precedes. It evidently refers to notes taken for the interest of the grantor of the power, and running to him separately,

and not notes taken for the interests of the other owners of the property, or to notes running to him and them jointly. In accordance with the doctrine already announced, it is held that authority to bind a principal as a party to a negotiable instrument, unless otherwise expressed, is authority to bind him separately, and not conjointly with another; or, to state the rule more generally, a power to an agent to act for his principal, in the absence of any thing to show a different intention, must be construed as giving authority to act in the separate individual business of his principal: Daniel on Negotiable Instruments, sec. 276; *Stainback* v. *Read*, 11 Gratt. 281; 62 Am. Dec. 648. This has been held to be the rule even where binding him conjointly with another does not affect him injuriously: *First Nat. Bank* v. *Gay*, 63 Mo. 33; 21 Am. Rep. 430. In this case, by joining one of the defendants jointly with the others in an indorsement of a joint note running to all, each of them is made liable, not merely for that part of the note belonging to him, and which was taken for his interest in the property, but for the entire amount of the note, taken for the interest of all, and belonging to all. This was clearly not authorized by the power. It may be, as suggested, that in real estate transactions of this kind it would have been more convenient to have provided for the execution of joint deeds, taking back joint notes and mortgages, and for joint indorsements. If so, it would have been very easy, if the parties so desired, to have executed joint powers of attorney to that effect; but they have not [184] done so, and there is nothing in the separate powers expressing or indicating any such intention.

Judgment reversed.

AGENCY—POWERS OF ATTORNEY—CONSTRUCTION.—Powers of attorney are to be strictly construed: *Frost* v. *Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831, and note; *Penfold* v. *Warner*, 96 Mich. 179; 35 Am. St. Rep. 591; *Monson* v. *Kill*, 144 Ill. 248; *Gouldy* v. *Metcalf*, 75 Tex. 455; 16 Am. St. Rep. 912, and note; and the authority given by them is never extended by intendment or construction beyond that which is given in terms or absolutely necessary to carry the authority into effect: *Gilbert* v. *Hess*, 45 Minn. 121; 22 Am. St. Rep. 724, and note; *Coulter* v. *Portland Trust Co.*, 20 Or. 469. See, also, the notes to *Munger* v. *Baldridge*, 13 Am. St. Rep. 280, and *Davenport* v. *Parsons*, 81 Am. Dec. 776.

HASTINGS *v.* THOMPSON.

[54 MINNESOTA, 184.]

NEGOTIABLE INSTRUMENTS—NOTE WITH CURRENT RATE OF EXCHANGE.—A stipulation for the payment of the current rate of exchange on a place other than the place of payment, inserted in a note for a certain sum of money, does not render it non-negotiable.

ACTION to recover on notes purchased by plaintiff in due course of business for value and before maturity, without notice of any defense or infirmity. The lower court overruled a demurrer to defendant's answer, and plaintiff appealed.

H. V. Rutherford, for the appellant.

Stringer and Seymour, for the respondent.

186 MITCHELL, J. The only point raised on this appeal is whether the instruments sued on are promissory notes, for, if they are, they are unquestionably negotiable under the law merchant. They are promises to pay specified sums of money in St. Paul, "with current exchange on New York city"; and the only question is whether this provision as to exchange renders the sums required to discharge them uncertain, within the meaning of the familiar rule that one of the essential qualities of a promissory note is that the amount to be paid must be fixed and certain and not contingent. In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments in question do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places. Upon examination of the reports and text-books it is surprising how little direct authority of any value is to be found as to the effect of the addition of such a provision to an instrument for the payment of money. Daniel, Randolph, and Tiedeman state in general that such a provision does not affect the commercial or negotiable character of 187 the paper, but none of them discuss it at any length, and all of them treat of the question as if it only went to the negotiability of the instruments, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all:

Tiedeman on Commercial Paper, sec. 28 *a;* Randolph on Commercial Paper, sec. 200; Daniel on Negotiable Instruments, sec. 54. We have found no English case directly in point, and none bearing on the question, except *Pollard* v. *Harries*, 3 Bos. & P. 335, where such an instrument was declared on as a promissory note. If the question was authoritatively settled in the leading commercial states of the union or in the federal courts we would be inclined, for the sake of uniformity, to follow their decisions; but we have been unable to find that the supreme court of the United States, or of either Massachusetts, New York, or Pennsylvania, has ever passed upon the question. The only cases, state, federal, or colonial, which we have found which may be considered as having passed on the question are the following, which may be classified thus: That such instruments are not promissory notes: *Lowe* v. *Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Read* v. *McNulty*, 12 Rich. 445; 78 Am. Dec. 467; *Carroll County Sav. Bank* v. *Strother*, 28 S. C. 504; *Palmer* v. *Fahnestock*, 9 U. C. C. P. 172; *Saxton* v. *Stevenson*, 23 U. C. C. P. 503; *Philadelphia Bank* v. *Newkirk*, 2 Miles, 442; *First Nat. Bank* v. *Bynum*, 84 N. C. 24; 37 Am. Rep. 604; *Russell* v. *Russell*, 1 McAr. 263; *Fitzharris* v. *Leggatt*, 10 Mo. App. 527; *Hughitt* v. *Johnson*, 28 Fed. Rep. 865; *Windsor Sav. Bank* v. *McMahon*, 38 Fed. Rep. 283. That such instruments are promissory notes: *Smith* v. *Kendall*, 9 Mich. 242; 80 Am. Dec. 83; *Johnson* v. *Frisbie*, 15 Mich. 286; *Leggett* v. *Jones*, 10 Wis. 35; *Morgan* v. *Edwards*, 53 Wis. 599; 40 Am. Rep. 781; *Bradley* v. *Lill*, 4 Biss. 473.

In very few of these cases is the question discussed at any length, or considered on principle. Some of them were decided by courts of inferior jurisdiction, and in others the remarks of the court were *obiter*. Many of those which hold that such instruments are not promissory notes rest, without discussion, upon a strict literal construction of the rule that the sum to be paid must appear from the face of the paper, without resort to extrinsic evidence. About the only cases where the question is discussed at any length upon principle or authority [188] are *Smith* v. *Kendall*, 9 Mich. 242; 80 Am. Dec. 83; *Bradley* v. *Lill*, 4 Biss. 473; *Morgan* v. *Edwards*, 53 Wis. 599; 40 Am. Rep. 781; and *Windsor Sav. Bank* v. *McMahon*, 38 Fed. Rep. 283.

In view of this state of the decisions, while in mere numbers the decided weight of authority may be in favor of the

contention of the defendant, we feel at liberty to decide the question in the way we deem most in accordance with principle and business usages, and in accordance with the rule which, in view of such usages, the leading courts of the country are most likely to finally settle down upon. The following are, in brief, the considerations which have led us to the conclusion that such instruments ought to be held to be promissory notes under the law merchant.

1. The reason and purpose of the rule that the sum to be paid must be certain is, that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that within the spirit of the rule requiring precision in the amount to be paid, a provision for the payment of the current rate of exchange, in addition to the principal amount named, does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note. A provision for the payment of exchange is very different from one for the payment of reasonable attorneys' fees in case of suit, as in *Jones* v. *Radatz*, 27 Minn. 240. The latter introduces an element of uncertainty very different, both in kind and degree, from that introduced by the former. Not only is the amount of [189] the attorneys' fees incapable of either easy or definite ascertainment, but the amount of it is more or less under the control of the holder of the instrument. Moreover, such a provision has never been considered in business circles as properly ancillary or incidental to commercial paper, or any part of its legitimate "luggage."

2. The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles. This was the very purpose of the statute of Anne, placing promissory notes on the same footing as bills of exchange, and thus setting at rest a question upon which there had been some difference of opinion in the courts. Now, we think we in safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answers would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt but that this is the way in which such paper is generally looked upon and treated in commercial and other business circles; and, if so, the courts should, as far as possible, make their decisions to conform to this general custom and understanding. We recognize the importance of simplicity and certainty in the terms and conditions of commercial paper; and appreciate the objections to permitting it to be loaded down with unnecessary "luggage," but we cannot see, under all the circumstances, and especially in view of what we believe to be the commercial usage, that any practical evil will result from permitting the addition of such a provision for the payment of current exchange on the principal amount. Nor are we disposed, as a rule, to extend the quality of negotiable paper to contracts for the payment of money beyond the strict limits of the already established rules of law; but to exclude from that category paper like that under consideration would be to exclude the very class of paper [190] which ought to be held negotiable, if any promissory notes ought to be so held—paper given and taken in commercial transactions, properly so called; for rarely, if ever, would a provision for exchange be incorporated in any other.

Order reversed.

Application for reargument denied July 20, 1893.

NEGOTIABLE INSTRUMENTS—NOTE WITH CURRENT RATE OF EXCHANGE. A promise to pay a sum certain "with current rate of exchange" is not a promissory note: *Lowe* v. *Bliss*, 24 Ill. 168; 76 Am. Dec. 742, and note; *Read* v. *McNulty*, 12 Rich. 445; 78 Am. Dec. 467. To the same effect, see *Smith* v. *Kendall*, 9 Mich. 241; 80 Am. Dec. 83, and note.

BOHN MANUFACTURING COMPANY *v.* HOLLIS.

[54 MINNESOTA, 223.]

COMBINATION IN TRADE—INJUNCTION.—An agreement between the members of a retail lumber association that they will not deal with any wholesale dealer or manufacturer who sells to customers, nor dealers, at a point where a member of the association is doing business, and containing a provision for notice being given to all members whenever a wholesaler makes any such sale, is not void as stipulating for an unlawful combination in restraint of trade, nor is a wholesaler who makes a sale in violation of such agreement entitled to enjoin such association from giving notice to all its members of the fact.

COMBINATIONS IN BUSINESS.—ASSOCIATIONS MAY LAWFULLY BE FORMED the object of which is to adopt measures that may tend to diminish the gains and profits of another.

AGREEMENTS IN GENERAL RESTRAINT OF TRADE are not actionable at the instance of third parties.

COMBINATIONS IN TRADE—LEGALITY OF.—Any one man, unless under contract obligation, or unless his employment charges him with some public duty, may lawfully refuse to work for or to deal with any man or class of men. This right which one man may exercise singly, many may agree to exercise jointly and make simultaneous declaration of their choice by voluntary association.

W. A. Lancaster, for the appellants.

Warner, Richardson, and Lawrence, for the respondent.

320 MITCHELL, J. The pleadings in this case, and the affidavits read on the motion to dissolve the temporary injunction, are so voluminous, and so abound in mere inferences as to motives and consequences, and in adjectives and other qualifying epithets, as to convey the impression, at first sight, that the facts were both complicated and controverted. But a careful analysis of the record proves that there is no real dispute as to the material facts, which are comparatively simple. Stripped of all extraneous matter, the case discloses just this state of facts: The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with

the retail lumber dealers. The defendant, the Northwestern Lumbermen's Association, is a voluntary association of retail lumber dealers, comprising from twenty-five to fifty per cent of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this case. The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for ten per cent of the amount of the sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but [331] procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon, plaintiff commenced this action for a permanent injunction, and obtained, *ex parte*, a temporary one, enjoining the defendants from issuing these notices, etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts must be presumed to be true, that if these notices should be issued the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's case*, 11 Coke, 98 *a*, assume that, on general principles, they have authority to correct or reform every thing which they may deem wrong, or, as Lord Ellsmere puts it, "to manage the state." But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber-yards in the various cities, towns, and villages are not only a public convenience, but a public necessity; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber

dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for ten per cent on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. [233] Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be "expelled"; but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred—to trade with the plaintiff or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense, means damage re-

sulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious: *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Dec. 346; *Mogul Steamship Co.* v. *McGregor*, 21 Q. B. Div. 544.

2. If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful": *Heywood* v. *Tillson*, 75 Me. 225; 46 Am. Rep. 373; *Phelps* v. *Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Jenkins* v. *Fowler*, 24 Pa. St. 308.

3. To enable the plaintiff to maintain this action, it must appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but, even if it were, this would not, of itself, give plaintiff a cause of action. No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable [324] at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public: *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598 [1892], App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks

apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable: *Bowen* v. *Matheson*, 14 Allen, 499; *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598 [1892], App. Cas. 25; *Parker* v. *Huntington*, 2 Gray, 124; *Wellington* v. *Small*, 3 Cush. 145; 50 Am. Dec. 719; *Payne* v. *Western etc. R. R. Co.*, 13 Lea, 507; 49 Am. Rep. 666.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded [235] upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see any thing unlawful or actionable in it: *Commonwealth* v. *Hunt*, 4 Met. 111; 38 Am. Rep. 346; *Carew* v. *Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Mogul Steamship Co.* v. *McGregor* [1892], App. Cas. 25.

Order reversed and injunction dissolved.

VANDERBURGH, J., absent, took no part.

COMBINATIONS.—The absolute right of a person to refuse to have business relations with any person whomsoever, whether the refusal is based on caprice, prejudice, or malice, must be limited to the individual action of the party who asserts the right. It is not equally true that one person may, from such motives, influence another person to do the same thing: *Delz* v. *Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755, and note. The defendants, eighteen journeymen tailors, by agreement, stopped work simultaneously and returned their work to the plaintiff unfinished and worthless in that condition. The plaintiff was unable to get any hands to finish his work. It was held that he might maintain an action for damages: *Mapstrick* v. *Rumge*, 9 Neb. 390; 31 Am. Rep. 415. No action lies against an employer for forbidding his employees to trade with a certain person: *Payne* v. *Western etc. R. R. Co.*, 13 Lea, 507; 49 Am. Rep. 666, and note. No action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting: *Heywood* v. *Tillson*, 75 Me. 225; 46 Am. Rep. 373. See, further, the extended note to *State* v. *Stewart*, 59 Am. Rep. 720.

MAXCY *v.* NEW HAMPSHIRE FIRE INS. CO.

[54 MINNESOTA, 272.]

INSURANCE — SUFFICIENCY OF COMPLAINT — LOSS PAYABLE TO MORTGAGEE.—As against general demurrer a complaint alleging that the property insured has been totally destroyed, and that a mortgagee, to whom the loss is payable under the policy, has sustained loss and damage in a specified sum, sufficiently alleges loss and damage to the insured owner.

INSURANCE—LOSS PAYABLE TO MORTGAGEE — PARTIES. — A policy of insurance by the terms of which a loss thereunder is made payable to a mortgagee is a contract for the benefit of the mortgagee, and either he or his assignee can enforce the liability in his own name to the amount of the mortgage debt without joining the insured as a party.

CONTRACTS—PROMISE FOR BENEFIT OF THIRD PERSON.—If one makes a promise to another for the benefit of and available to a third person, the latter can maintain an action on the promise in his own name.

Kueffner and Fauntleroy, and Freeman P. Lane, for the appellant.

Wilson and Van Derlip, for the respondent.

274 COLLINS, J. 1. The complaint herein, although not as perfect as it should have been, was good, as against a general demurrer. The policy, set out in full, insured Thompson, as owner of the building described, against all direct loss or damage by fire, to the amount of seven hundred and fifty dollars. This loss or damage, if any, under the policy, was made payable to one Mitchell, trustee for Emma C. Gregg, as mortgagee, as her interest might appear. It appeared from

assign may be joined with the mortgagor as coplaintiff: *Williamson* v. *Michigan etc. Ins. Co.*, 86 Wis. 393; 39 Am. St. Rep. 906. See *Motley* v. *Manufacturers' Ins. Co.*, 29 Me. 337; 50 Am. Dec. 591.

CONTRACT FOR THE BENEFIT OF THIRD PERSON.—A promise made by one person to another for the benefit of a third, who is a stranger to the consideration, cannot be enforced by the latter: *Lineman* v. *Moroes*, 98 Mich. 178; 39 Am. St. Rep 528, and extended note.

LAMPREY *v.* MEAD.

[54 MINNESOTA, 290.]

PUBLIC LANDS—ERRONEOUS SURVEY—RIGHTS OF PATENTEE.—The government cannot correct a survey so as to defeat or injuriously affect the rights of its patentees by any *ex parte* acts, or in any way, except by a proceeding to which such patentees are parties, and in which they have an opportunity to be heard. The United States has no more right to limit or diminish the effect of its past grants by its own acts than has a private grantor.

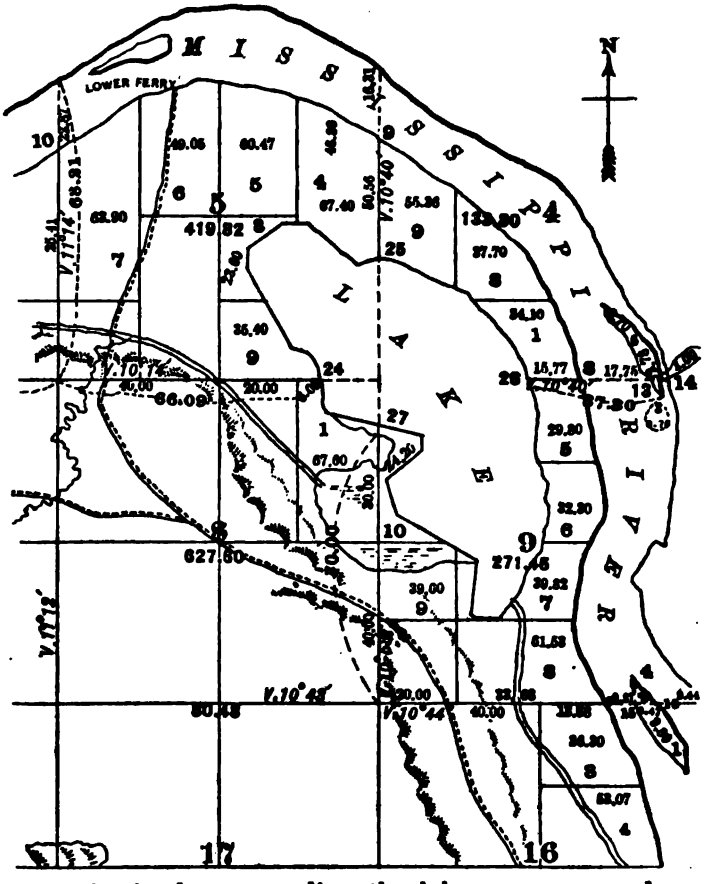
PUBLIC LANDS—RIGHTS OF PATENTEE—ERRONEOUS SURVEY—MEANDER LINES.—A United States patent to land issued under a plat of a government survey, from which it appears to be bounded on one side by a meandered non-navigable lake, cannot be attacked by a third party as void in so far as it purports to convey the land under the water, although the survey is erroneous in treating the tract covered by water as a lake to be meandered, instead of land to be surveyed. Such patent can be avoided only at the instance of the United States, in proper proceedings for its reformation, to which the patentee must be made a party.

J. M. Gilman, *M. D. Grover*, *and Stryker and Moore*, for the appellant.

John A. Larimore, for the respondents.

[290] GILFILLAN, C. J. The action is for partition. The complaint claims that the plaintiffs and the defendants Mead, Reilly, and Metcalf are the owners, as tenants in common, of the land, and the other defendants are joined to determine their claim of title. The other defendants who answer claim under the railroad land grant to the territory in 1857. The lands in township No. 28 north, of range No. 22 west, of the fourth post meridian, were surveyed in 1853, the subdivision lines being run in September of that year. The map or plat of the survey was filed in the office of the surveyor general, and was by him examined and approved February 27, 1854. In May, 1855, patents issued for lot 9, section 4, and lot 9, section 5, and in March, 1855, a patent

issued for lots 4 and 8, section 5. The plaintiffs and defendants Mead, Reilly, and Metcalf claim under these patents. [297] On the map or plat was a tract marked "lake," on which the lots so patented abutted. The following rough diagram shows approximately the position of the lots with reference to the "lake."



All the lands surrounding the lake were surveyed, and appear platted as fractional lots. The controversy is over the bed of what is designated "lake" in front of the patented lots, the plaintiffs claiming that, according to the law as laid down in *Hardin* v. *Jordan*, 140 U. S. 371; *Mitchell* v. *Smale*, 140 U. S. [298] 406, and *Lamprey* v. *State*, 52 Minn. 181; 38 Am. St. Rep. 541, the title to the bed of the lake in front of these lots passed by the patents, the defendants claiming

under the land grant that by reason of the facts which they offered to prove it remained in the United States, and passed by the land grant to which those defendants have succeeded.

On the trial the plaintiffs introduced the plat and patents and deeds passing the titles derived under the patents to them and the defendants Mead, Reilly, and Metcalf, and rested. The other defendants made certain offers of evidence, which, on plaintiffs objecting, were overruled. These offers and the rulings thereon present the questions in the case. The offers are too long to be quoted in this opinion, but they included a survey of the land covered by the "lake," made and approved in 1861, and facts which it is claimed would establish, not that when the original survey was made the water did not cover the tract marked "lake," but that it ought to have been surveyed as land, and not to have been meandered as a lake. Conceding that the water was there at the time of the survey, and presented the question whether for the purpose of the survey it ought to be regarded as a lake or as land, the offers are, in effect, to impeach the survey by showing that it was error or mistake to regard it as a lake. The proposition suggests a question of great practical importance. It is a serious matter, in this state at least, where, as is of common knowledge, what was undoubted lake ten years ago might five years later be only marsh, and to-day dry land, if, after the lapse of forty years, a United States survey representing a tract of water as meandered lake, and according to which the government has conveyed the abutting land, can be impeached, and the rights of the patentees unseated. But the question is not presented in this case for solution. Of course, so long as the government had not conveyed any of the lands abutting on the lake, it could correct the survey, survey the tract under the water as land, and convey it as such. And it may be conceded (though it is by no means clear) that the government is not bound by an erroneous or mistaken survey, even after it has conveyed the land according to it; but it cannot correct such erroneous survey so as to defeat or injuriously affect the rights of its patentees by any *ex parte* acts, or in any way except by a proceeding to which such patentees [329] are parties, and in which they have an opportunity to be heard. It has no more right to limit or diminish the effect of its past grants by its own acts than has a private grantor: *Lindsey* v. *Hawes*, 2 Black, 554, furnishes an instance in which rights having

been acquired under an erroneous survey, it was held that a subsequent correct survey did not defeat the rights so acquired. It follows that the survey of 1861 does not affect the case.

The patents conveyed the fractional lots according to the survey as it was represented by the plat. The latter was therefore part of the patents as much as though it were fully set forth in them. On their face they transferred to the patentees the right to the land under the water, not as defendants seem to argue, if appurtenant and as appurtenant to the shore land, but they took the fee (a fee cannot be appurtenant), because when land is bounded in the conveyance by a non-navigable lake or river, it is presumed the parties intend the center, and not the shore, line to be the boundary. They may limit the grant to the shore line if that intention be sufficiently expressed. The patents, even though it could be proved that the survey was a mistake, and that the determination of the government surveyors and officials that the water on the land when the survey was made constituted a lake to be meandered was erroneous, were not void so far as they purported to convey the land under water. At worst they were only, to that extent, voidable at the instance of the government, in proper proceedings for reformation of the patents: *White* v. *Burnley*, 20 How. 235; *Spencer* v. *Lapsley*, 20 How. 264. The case is not one where a boundary given is an impossible one; where the monument given as marking it does not exist or cannot be found. In such a case the boundary or monument must be disregarded, and the extent of the grant ascertained by other means, if the conveying instrument furnish them. There might be a case where the land is in terms bounded by a lake or river, and no lake or river is in fact to be found where the granting instrument indicates it to be. There might, in such a case, be a question how far the court will go to find such boundary before resorting to other means to define and locate the grant. Such a case was presented in *Whitney* v. *Detroit Lumber Co.*, 78 Wis. 240. In that case a fractional lot was wholly in a quarter of a quarter section, if full, and appeared by the plat of the survey to be bounded [see] by a lake partly on that forty-acre tract. The decision was, in effect, that the court would not go, to find the lake as a boundary and locate the land, beyond the limits of the governmental subdivision of which the lot purported to be a fraction. Such is not this case. In this case the bound-

ary given was where the survey indicated, the only claim being that it was mistake or error in the survey to treat the water as lake. The patents being at worst only in part voidable, they passed the land, and, if the government choose to acquiesce in and abide by them, no one else can complain. If a patent issue to A, when it ought to have issued to B, or if a patent issued to A prejudice the existing rights of B, the latter may have his remedy against A; but one who has no interest which is affected by the patent cannot question it: *Minnesota Land and Inv. Co.* v. *Davis*, 40 Minn. 455. The defendants do not even stand in the position of one acquiring a subsequent title or claim of title from the United States. The grant of 1857 attached to no land which, when the lines of railroad were definitely located, had been otherwise appropriated by the United States. The decisions are uniform that land, the claim to which, though ill founded, was *sub judice*—that is awaiting determination—was excepted from the operation of the grant, because otherwise appropriated within the meaning of the act. An outstanding patent, though voidable, is an appropriation, within the reason of that rule.

Order affirmed.

PUBLIC LANDS—ERRONEOUS SURVEY—CORRECTION.—The governor may correct a mistake in a grant of state lands if the rights of third persons have not intervened, otherwise there must be a judgment or decree in a judicial proceeding between the litigating parties: *Tison* v. *Yawn*, 15 Ga. 491; 60 Am. Dec. 706, and note; *Sykes* v. *McRory*, 10 Ga. 465; 54 Am. Dec. 402. The title to land located and patented under an official survey is not disturbed by a subsequent survey, which disregards and interferes with that according to which the prior survey was made and the patent procured: *Slack* v. *Orillion*, 13 La. 56; 33 Am. Dec. 551, and note. A state grant or patent is to be deemed conclusive when drawn in question in a collateral action so far as to show that the state has passed its title to the lands therein contained. Such grant can only be attacked by a direct proceeding on the part of the government for that purpose: *Overton* v. *Campbell*, 5 Hayw. (Tenn.) 165; 9 Am. Dec. 780; *Norvell* v. *Comm.*, 6 Munf. 238; 8 Am. Dec. 742; *Jackson* v. *Hart*, 12 Johns. 77; 7 Am. Dec. 280.

REID *v.* HAM.

[54 MINNESOTA, 305.]

EXTRADITION—LIABILITY TO CIVIL PROSECUTION.—A party brought into one state from another by interstate rendition proceedings is not, while held in custody in the former state for the alleged crime, exempt from prosecution in a civil action in that state.

William G. White, for the appellant.

M. H. Albin, for the respondent.

305 DICKINSON, J. The defendant, being a citizen of the territory of Utah, was brought to this state from that territory under arrest as a fugitive from justice, upon a requisition, pursuant to the constitution and laws of the United States. While he was held in custody here under the criminal charge for which he had been returned to this state, this plaintiff instituted a civil action against him by the service of a summons. On motion the district court set aside the service of the summons for the reason that it was considered that the defendant was exempt from liability to be so prosecuted civilly while so held in custody. The plaintiff was not in any way concerned in the interstate rendition proceedings, nor is this action in any way connected with the criminal charge. The plaintiff appealed from this order setting aside the service of the summons.

Upon a consideration of the case we have come to a conclusion contrary to that of the learned judge of the district court. We are of the opinion that one thus brought into this state from another state or territory of the union by interstate rendition proceedings is not, by reason of that fact, while held in custody for the alleged crime, exempt from prosecution in a civil action The uncertainty as to the law on this point, which has given rise to conflicting decisions, has been to a great extent dispelled by recent decisions, among which we notice particularly that of the supreme court of the United States in *Lascelles* v. *Georgia*, 148 U. S. 537; 306 and to the same effect *People* v. *Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850; and *Commonwealth* v. *Wright*, 158 Mass. 149; 35 Am. St. Rep. 475, and cases cited. These cases involved the question whether one who, as a fugitive from justice, has been brought from another state by interstate rendition proceedings, is subject to trial for other offenses than that for which he

has thus been brought into the state. It may now be regarded as settled that this may be done withou violating the lettter or spirit of the law relating to interstate rendition. The written law upon the subject is found in the United States constitution, article 4, section 2, paragraph 2, and in the act of February 12, 1793 (1 U. S. Stats., c. 7, p. 302), enacted to carry the constitutional provision into effect, and which is now embodied in the United States Revised Statutes, sections 5278 and 5279. The supreme court of the United States, construing the federal law in the case above cited, considered that neither expressly nor by implication was there conferred any right or privilege of exemption from trial for any criminal act committed in the state to which the fugitive may have been returned. The sole object of the provisions of the constitution and the act of Congress was regarded as being to secure the surrender of persons accused of crime who have fled from the justice of the state whose laws they are charged with violating. Such cases were distinguished from those of extradition under treaties with foreign powers. This construction which the supreme court has given to the federal constitution and statute is to be accepted as final, and it can no longer be well claimed that the written law either expressly or by implication affords exemption from prosecution for other crimes than those for which the accused has been returned to the state. The decisions in the state courts may be regarded as having a wider scope (as they are not restricted to merely federal questions), going to the extent that neither by the federal law nor by any principle of the unwritten law is such exemption afforded. These decisions logically, if not necessarily, lead to the conclusion that detention under such criminal proceedings affords no exemption or privilege from civil prosecutions; and this has been so decided: *Williams* v. *Bacon*, 10 Wend. 636; *Adriance* v. *Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317. If the federal law neither expressly nor by implication protects the accused from prosecution for other crimes than that for which he was brought back to the [307] state, it cannot be construed as affording exemption from civil suits.

It has been said that good faith on the part of the state requires that such exemption be afforded; but that begs the question. If the law does not give this protection or privilege, the state is not wanting in good faith if it refuses to recog-

nize it. The accused does not come voluntarily into the state, induced thereto by circumstances which could be regarded as affording the assurance on the part of the state that while detained here he shall be exempt from liability to ordinary civil proceedings. The state holds out no inducements by which his conduct in coming is influenced. He is compelled by legal process to come, irrespective of his will or consent. It is idle to say that only for the purpose of proceedings for the crime for which he is brought into the state is the accused to be deemed as being here. The answer is that he is here.

No considerations of public policy, as we think, require that the accused should be exempt from being prosecuted civilly. The considerations upon which our decisions in *Sherman* v. *Gundlach*, 37 Minn. 118, and *First Nat. Bank* v. *Ames*, 39 Minn. 179, were founded have little, if any, application. The declared exemption from service of summons upon a nonresident witness, in the former case, and in the other upon a nonresident party to an action on trial here, and who was also a witness, was based upon the policy of encouraging the voluntary personal attendance, at the trial of causes, of persons whose presence and testimony may be necessary for the better administration of justice, and whose attendance cannot be compelled. As has already been said, in cases of extradition or interstate rendition, there is no encouragement or inducement held out to the accused to come voluntarily into the state. He comes by compulsion. We fail to see how the administration of justice could be promoted by holding the accused protected from the service of a summons in a civil action.

It has been said that if a rule of absolute exemption is not maintained in such cases, criminal proceedings will be resorted to fraudulently, merely for the purpose of securing the rendition of a person from another state so that he may be sued in a civil action. We think that protection against such frauds may reasonably be left to be applied when cases of fraud appear, and the courts may be trusted [sic] to jealously guard against such an abuse of legal process. We deem it unnecessary and unreasonable, as a means of guarding against possible fraud in some cases, to hold the accused in all cases to be absolutely exempt from liability to respond to civil process, even though confessedly no fraud has been practiced.

Order reversed.

EXTRADITION—LIABILITY TO CIVIL PROCESS.—Where the defendant was extradited on a criminal charge, it was held that he was subject to arrest on civil process before he could return to the country from which he had been extradited: *Adriance* v. *Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317.

EXTRADITION.—That one can be held and tried for a crime other than that for which he was extradited, see *Commonwealth* v. *Wright*, 158 Mass. 149; 35 Am. St. Rep. 475; *Lascelles* v. *State*, 90 Ga. 347; 35 Am. St. Rep. 216; *People* v. *Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850, and note; and *State* v. *Glover*, 112 N. C. 896.

ROSEMOND *v.* GRAHAM.

[54 MINNESOTA, 323.]

NEGOTIABLE INSTRUMENTS—PARTIES.—An indorsee of a note may maintain suit thereon in his own name alone against the maker, though others are beneficially interested in the paper.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER OF COLLATERAL.—An indorsee of negotiable paper taken before maturity as collateral security for an antecedent indebtedness, in good faith, and without notice of defenses, such as fraud, which might have been available as between the original parties, holds the paper free from such defenses.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—NOTICE OF DEFENSES.—Notice of defenses which an indorsee of negotiable paper taken before maturity as collateral security for antecedent indebtedness must have, in order to prevent his enjoying the advantage of a *bona fide* purchaser, must be such as to charge him with fraud or actual bad faith.

Warner, Richardson, and Lawrence, for the appellant.

Lusk, Bunn, and Hadley, for the respondent.

328 DICKINSON, J. The defendant executed to one Maxfield his negotiable promissory note. The case before us shows that Maxfield was indebted to the plaintiff and two other persons, William A. and Charles M. Campbell. The debt of Maxfield being due, he indorsed the defendant's note in blank, and before its maturity delivered it to the plaintiff, who wrote over Maxfield's blank indorsement in the usual form a direction that payment be made to himself, the plaintiff. As such indorsee the plaintiff prosecutes this action on the note against the maker. At the trial upon the evidence presented by both parties the court directed a verdict for the plaintiff. The correctness of that ruling is in question on this appeal.

While it appears that the indorsement to the plaintiff was made on account of the whole indebtedness to the plaintiff and the Campbells, and that they all had a beneficial interest in the paper, it also appears that as between themselves

it had been committed to the plaintiff to act for their common interest, and according to his own discretion, in obtaining payment or security from Maxfield. It does not prejudice the defendant, and constitutes no defense, that the Campbells are not parties to the action: *Elmquist* v. *Markoe*, 45 Minn. 305, and cases cited. The defendant sought to show in defense, and now claims to have shown, that Maxfield induced him to execute the note by fraudulent representations. The ruling of the court now under review was that this defense was not available as against the plaintiff. That is the important question in the case. Its solution depends upon the question whether the plaintiff so acquired and holds the note that he enjoys [339] the legal advantage and protection ordinarily attending the indorsement of negotiable paper to *bona fide* purchasers. Although Maxfield's testimony, taken alone, may tend to show a sale of the note to the plaintiff, yet it is apparent from the transaction itself, which was by letters between the parties, which are before us in the case, that the note was transferred as collateral security for the existing debt. The subsequent understanding of Maxfield, or the manner in which he afterwards treated the matter, could not change the obvious nature of the prior transaction. Hence, we come to the question whether a creditor who *bona fide* receives by indorsement negotiable paper not yet due as collateral security for a prior indebtedness holds the same free from any defense of fraud which might have been available as between the original parties. The decisions have long been at variance, and the reasons which may be advanced in support of diverse conclusions have been so fully stated, and so often reiterated, that we need not restate them, and will not attempt to add to them. The question has never been decided in this court. In the following jurisdictions it has been settled that the holders of such collateral securities enjoy the advantages peculiar to *bona fide* purchasers of negotiable paper: California, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, New Jersey, Rhode Island, South Carolina, Texas, Virginia, the federal courts, England, and Canada. About an equal number of state courts have declared the contrary rule. The subject was fully discussed, and the rule finally settled as first above indicated in the federal courts in the case of *Railroad Co.* v. *National Bank*, 102 U. S. 14. The modern law-writers very generally recognize this as the prevailing rule, and among late

decisions in jurisdictions where the opposite doctrine has long been settled may be found expressions indicating that the courts would have followed the law as declared by the supreme court of the United States if they had not been bound by their own former decisions: See *Smith* v. *Bibber*, 82 Me. 34; 17 Am. St. Rep. 464. Most of the authorities are cited and the subject well presented in Jones on Pledges, 107, 111, et seq. See, also, Bigelow on Bills and Notes, 497. This being a matter of general commercial law, the rulings in the federal courts will everywhere follow that of the supreme court, as above indicated, irrespective [sic] of what the state courts may declare to be the law in their respective jurisdictions. Diverse rules of law, affecting ordinary commercial transactions, cannot be finally declared and enforced by different courts within the same jurisdiction without resulting evils too great to be disregarded. Without assuming now to determine as to which side of the question is supported by the better reason, it is considered that our decision should be such that there shall be but one rule of law recognized and enforced in all the courts in this state. We therefore decide that the indorsee of negotiable paper taken before maturity as collateral security for an antecedent indebtedness, in good faith, and without notice of defenses, such as fraud, which might have been available as between the original parties, holds the same free from such defenses. We the more unhesitatingly declare this as the rule of law because, in addition to the great weight of authority in its favor, we believe that it is in accordance with the understanding and usage which have generally prevailed in commercial circles.

If, then, the plaintiff became an indorsee of the note *bona fide* without notice of the fraud claimed to have been involved in its execution, that defense is unavailable. We will assume that, if fraud was shown, the burden rested on the plaintiff to prove that he had no notice of it. The notice which the indorsee must have, in order to prevent his enjoying the advantage of a *bona fide* purchaser, must be such as to charge him with fraud or actual bad faith: *Merchants' Nat. Bank* v. *McNeir*, 51 Minn. 123. We do not see that the plaintiff testified upon this subject, but it appeared from the testimony of Maxfield that the plaintiff knew nothing about the circumstances of the transaction between Maxfield and the defendant in the course of which the note was given. This testimony is not opposed by any evidence, and we see noth-

ing in the case which would justify the conclusion that the plaintiff had any notice of the fraud, if there was any. He, as well as the Campbells, resided in a distant state. The communications connected with the indorsement and sending of the note to the plaintiff (which were all between Maxfield and the plaintiff alone) disclosed nothing as to the circumstances of the procuring of the note by Maxfield. Hence, while there is not much affirmative evidence of the [331] absence of notice to the plaintiff of any fraud, we think there was enough to make a *prima facie* and credible case in his favor; and being unopposed, as we consider, by evidence to the contrary, our conclusion is that the court was right in directing a verdict for the plaintiff.

Judgment affirmed.

GILFILLAN, C. J., did not sit.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER AS COLLATERAL.—A *bona fide* holder of commercial paper taken as collateral security for a debt created either before or at the time of the transfer is entitled to enforce payment thereof without regard to equities existing between prior parties of which he had no notice: *Crump* v. *Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345, and note, with the cases collected.

NEGOTIABLE INSTRUMENTS.—FRAUD IN THE INCEPTION AS AFFECTING BONA FIDE HOLDER: See *Ward* v. *Johnson*, 51 Minn. 480; 38 Am. St. Rep. 515; and the extended notes to *Willard* v. *Nelson*, 37 Am. St. Rep. 458, and *Bedell* v. *Herring*, 11 Am. St. Rep. 309.

NEGOTIABLE INSTRUMENTS—ACTIONS ON—PARTIES—INDORSEE.—An action on a promissory note payable at a bank is properly brought in the name of the indorsee or holder of the legal title, though he may not be the beneficial owner: *Carmelich* v. *Mims*, 88 Ala. 335. The holder of a promissory note under the unconditional indorsement of the payee has the legal title, and may sue in his own name, though the assignor possesses the beneficial interest in the proceeds: *Elmquist* v. *Markoe*, 45 Minn. 305. One to whom a note is given may enforce the same in his own name though a third person has an interest in the debt: *Lundberg* v. *Northwestern Elevator Co.*, 42 Minn. 37. One to whom a note has been indorsed as collateral security may maintain an action thereon against the maker after the payment of the debt, either for himself or as trustee, unless the maker is thus deprived of some equitable defense as against the payee: *Logan* v. *Cassell*, 88 Pa. St. 288; 32 Am. Rep. 453. An indorsee of an accommodation note after maturity, with or without knowledge of its consideration, may enforce it against the prior parties to the same extent as if it had been executed for value if his immediate indorser was entitled to enforce it: *Cottrell* v. *Watkins*, 89 Va. 801; 37 Am. St. Rep. 897.

YOUNG v. BOARD OF EDUCATION.

[54 MINNESOTA, 385.]

ULTRA VIRES—MUNICIPAL CORPORATIONS.—The action of the officers of a school district in borrowing and expending money in the improvement of school property without lawful authority raises no liability against the school district for money had and received, nor is it sufficient to create an estoppel against such district to deny its liability for the benefit received. No estoppel or ratification can be inferred from its retention or enjoyment of the benefit of the expenditure when it has had no option to reject the improvement.

E. P. Peterson, and Spooner and Taylor, for the appellant.

Young and Nye, and Daniel Fish, for the respondent.

387 VANDERBURGH, J. The plaintiff recovered a verdict, under the direction of the court, for two hundred and five dollars, and interest, for money advanced by Stevens & Co., of whose insolvent estate the plaintiff is receiver. The evidence in the case tended to show that the defendant had expended the proceeds of bonds lawfully issued in the erection of a schoolhouse for the district, but the money derived from the bonds was insufficient to complete the building, and thereupon the treasurer of the district, one Peterson, arranged with Stevens & Co., who were bankers, for additional funds to complete the same, and drew checks upon them for the amount of two hundred and five dollars, which were honored and paid, though the district had no funds, and the money was expended in paying for labor and material furnished for the building, under the direction of the treasurer and other officers of the board. It does not appear that the board, as such, ever authorized the loan in question or the expenditure of the money in the manner stated, but the money was secured and expended, as may be inferred, by individual members or officers of the board, upon the belief that their action in the premises would be approved by the defendant and the district. A school district order was subsequently issued to Stevens & Co. for the amount, but whether at a lawful meeting of the board is left in doubt by the evidence.

The question, then, is whether the mere fact that the money was received and expended by the officers of the district in improving its property, though without lawful authority, raises a liability against the corporation for money had and received, or is sufficient to create an estoppel against the district to deny its liability therefor. But it cannot be said that

the district has either received or expended the money, or that it was bound by the acts of its officers, and no estoppel or ratification can be inferred from the fact that it retains and enjoys the benefit of the expenditure, because it is inseparable from its property, and the case is unlike an unauthorized [sic] purchase of chattels, which could be restored. It has no option to reject the improvement in this instance: *Shaw* v. *First Baptist Church*, 44 Minn. 25. It would be a very unsafe rule to establish to hold that school officers might borrow money at their pleasure, and bind the district because the same is expended by them in improving the property of the district. The case is to be distinguished from *Borough of Henderson* v. *County of Sibley*, 28 Minn. 515. There the money claimed had been deposited in the county treasury, and was used and expended by the county in the erection of a courthouse, which it had authority to build. It was expended for a lawful purpose by the proper authorities, and the county could not deny that it had, or had used for its benefit, plaintiff's money, received without consideration, and was bound to refund.

Order reversed, and new trial granted.

MUNICIPAL CORPORATIONS—ULTRA VIRES.—A municipal corporation is not estopped from denying the validity of a contract made by its officers when there has been no authority for making the contract: *Newbery* v. *Fox*, 37 Minn. 141; 5 Am. St. Rep. 830; *Clark* v. *Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423, and note; *McDonald* v. *Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; *Matheweon* v. *Grand Rapids*, 88 Mich. 558; 26 Am. St. Rep. 299. When a contract entered into by a school district for the payment of school money is void the retention by such municipality of the fruits of such contract will not subject it to liability, either under such contract or upon a *quantum meruit*: *Goose River Bank* v. *Willow Lake School Tp.*, 1 N. Dak. 26; 26 Am. St. Rep. 605, and note. See, further, on this subject, the notes to *Nashville* v. *Sutherland*, 36 Am. St. Rep. 95, and *Orlando* v. *Pragg*, 34 Am. St. Rep. 26.

NETTLETON *v.* RAMSEY COUNTY LAND AND LOAN COMPANY.

[54 MINNESOTA, 395.]

SUBROGATION—PURCHASER OF MORTGAGED PREMISES—PAYMENT BY SURETY ON NOTES.—When a purchaser of mortgaged premises has expressly assumed the payment of the mortgage debt as part of the consideration, an indorser who has become liable on the mortgage notes is entitled, upon payment thereof, to subrogation to the rights and remedies of the payee of such notes, and may recover of such purchaser the amount thereof. Such right of subrogation extends not merely to the mortgage security, but also to the debt and remedies to enforce it.

SURETYSHIP—RIGHT OF SURETY UPON PAYMENT OF PART OF DEBT. When there is an agreement to pay an entire debt evidenced by notes maturing at different times, a surety who pays one of the notes is entitled to maintain an action against the principal debtor for the installment so paid, without waiting until the whole indebtedness is paid.

SUBROGATION—RIGHTS OF SURETY.—Before a surety can claim the right to be subrogated to the rights of the creditor he must pay or discharge the debt in money, or in property taken as money.

SURETYSHIP—INDEPENDENT CONTRACT AS AFFECTING.—The liability of a purchaser of mortgaged premises, who, by the deed conveying the property, expressly assumes the payment of the mortgage debt, is not qualified or limited by an independent agreement between him and his grantor, by which the latter promises to pay certain installments of the mortgage debt as it falls due. Such agreement is for the sole benefit of the purchaser, and is in the nature of indemnity to him.

James E. Trask, for the appellant.

John W. Lane, for the respondent.

396 VANDERBURGH, J. The plaintiff, who was the owner of certain premises described in the complaint, sold and conveyed the same to one Marvin, and the latter, for part of the purchase price, executed and delivered to the plaintiff his four promissory notes for twelve hundred dollars each, secured by mortgage upon the property. Thereafter, on the thirtieth day of October, 1888, Marvin conveyed the land to the defendant, and by the terms of the deed conveying the same, and as part consideration therefor, the defendant assumed and agreed to pay all the indebtedness secured by the mortgage. On the twenty-first day of November, 1888, the plaintiff assigned and transferred the mortgage and notes above mentioned to the London and Northwest American Mortgage Company, and at the same time, as the court finds, indorsed each of the notes, and duly waived demand of payment and notice upon the back thereof. No part of the

indebtedness so secured has been paid by the defendant, but it is found that the plaintiff, by virtue of his liability as indorser upon the notes, was called upon to pay, and upon the fifteenth day of March, 1892, did pay, as alleged in the complaint, the interest and the note which matured on October 1, 1890. The trial court held that, by virtue of such payment, he was subrogated to the rights of the assignee of the mortgage, and entitled to recover of this defendant the amount so paid.

1. In such cases the payment does not extinguish the debt which is kept alive for the benefit of the surety, and is in equity treated as a purchase, investing him with the same rights in respect to securities as were possessed by the creditor: *Felton* v. *Bissel*, 25 Minn. 19. And where, as in this case, a grantee of mortgaged premises expressly assumes and agrees to pay off the mortgage, subrogation extends not merely to the mortgage security, but to the debt; and the surety, on payment of the debt, may be subrogated not only to the security, but to the remedy of the creditor upon the express contract of the purchaser who has assumed to pay the same: 2 Jones on Mortgages, sec. 883; *Rardin* v. *Walpole*, 38 Ind. 146; Sheldon on Subrogation, 2d ed., sec. 181. If the plaintiff, the payee in the notes, has been obliged to pay the debt, he is entitled to [397] be subrogated to all the remedies of the holder of the debt and mortgage.

2. The defendant invokes the rule that the surety is not entitled to be subrogated until he has paid the entire debt, but that is not applicable where separate notes or installments are paid, and the remedy sought is upon the promise or contract of the principal debtor to pay an entire debt payable in installments, and not the apportionment or application for his benefit of securities in the hands of the creditor. No question can arise here as to the sufficiency of the security as between plaintiff and the principal creditor, because defendant's promise and undertaking are to assume and pay the entire debt, and it is immaterial in whose hands the notes are. No apportionment is required, therefore, and it is not material to plaintiff's rights that he has as yet paid only one of the notes, and not the entire debt. The defendant is the party ultimately liable to pay the indebtedness in full, and it does not concern it that the notes are held by different parties, because the defendant is bound to pay the entire

debt represented by the notes, for it has agreed to do so upon sufficient consideration.

3. The defendant also insists that the evidence in the case is insufficient to establish the fact of the payment and satisfaction of the note and interest so as to entitle plaintiff to subrogation. The liability of the debtor upon the original debt must be discharged except as to the surety; hence, before the latter can claim to be subrogated, he must pay or discharge the debt in money or property taken as money. The court in this case finds that the debt sued for was paid. As proof of the fact the evidence is not very strong or satisfactory, but there is some evidence to support the finding; enough, we think, to call upon the defendant to make some showing in rebuttal. But this was not done, and the question was left to rest upon the evidence of plaintiff only. The note was evidently taken up, for it was delivered to plaintiff by the second indorser, and is in his possession; and he testified that it was paid by his notes, and presumptively the case stands as if the note and demand for overdue interest had been assigned to him.

4. When the defendant purchased the mortgaged premises it took a bond from Marvin, its grantor, in which he obligates himself to sell for the defendant enough of the lots conveyed to meet the $888 payments due in 1889 on the mortgage assumed by it, or pay the same when due, and take stock of the company for the amount so disbursed. This agreement was for the benefit of the defendant, and is in the nature of indemnity, but in no way qualified or limited its liability upon its covenant in the deed, and cannot be read with it as a part of the contract of the defendant in assuming the mortgage. The defendant's remedy is against Marvin solely.

Order affirmed.

SUBROGATION—PAYMENT OF PART OF DEBT.—A surety paying any part of a bond for purchase money, when the vendor also reserved a lien upon the land, is subrogated to the vendor's rights under the lien: *Uzzell* v. *Mack*, 4 Humph. 319; 40 Am. Dec. 648.

SUBROGATION—PAYMENT TO CREATE RIGHT.—It is not liability to pay but actual payment to the creditor which raises the equitable right to be subrogated to his remedies: *Insurance Co.* v. *Fidelity Title etc. Co.*, 123 Pa. St. 523; 10 Am. St. Rep. 546, and note; *Forrest Oil Co.'s Appeals*, 118 Pa. St. 138; 4 Am. St. Rep. 584.

CARPENTER *v.* AMERICAN BUILDING AND LOAN ASSOCIATION.

[54 MINNESOTA, 403.]

CONVERSION—WHEN IRREVOCABLE.—The wrongful and irregular sale of stock of a shareholder in a corporation for the nonpayment of dues is a conversion of the stock by the corporation, for which an action can be sustained against it by the owner or his assignee. The corporation cannot avoid liability, nor mitigate the damages which the shareholder is entitled to recover by an offer to reinstate such shareholder upon payment of the accrued delinquent dues, made after it has been judicially determined that such sale was unlawful.

CONVERSION—OFFER TO RETURN GOODS.—When an actual conversion of goods has taken place the owner is generally under no obligation to receive them back upon a tender by the wrongdoer before bringing his action, nor does such offer to return mitigate the damages which the owner is entitled to recover.

CONVERSION.—ANY DISTINCT ACT OF DOMINION wrongfully exerted over one's property, in denial of his right, or inconsistent therewith, is and may be treated as a conversion.

CONVERSION—OFFER TO RETURN GOODS—MITIGATION OF DAMAGES.—When a conversion lacks the element of willfulness, and has been committed in good faith, the court in its discretion may order a return of the goods upon timely application by the wrongdoer, accompanied by an offer to pay all costs and a showing that no real injury will result to the owner when possession is restored. The right of action is not defeated by the order of the court, but damages are thereby mitigated.

CONVERSION OF STOCK—SURRENDER OF STOCK CERTIFICATES.—The wrongful and irregular sale of corporate stock by the corporation issuing it is a conversion, for which an action can be maintained by the owner or his assignee without surrendering the certificates of stock.

ACTION against a corporation for the value of shares of stock sold by it. While plaintiff, as owner of the stock by assignment, was in default in the payment of dues thereon, the corporation sold the stock at auction without the notice to plaintiff required by the by-laws of the corporation. Judgment for plaintiff. Defendant appeals.

C. M. Cooley, Hart and Brewer, and Rea and Hubachek, for the appellant.

N. Fetter, Dodd and Bowman, and Lusk, Bunn, and Hadley, for the respondents.

406 COLLINS, J. In substance, the complaint herein is identical with that involved in *Allen* v. *American B. & L. Assn.*, 49 Minn. 544; 32 Am. St. Rep. 574. The conspicuous difference in the answers in the two actions is that in the case just mentioned the defendant association justified the trans-

actions of which the plaintiff complained, affirmed the regularity and validity of the alleged sales, and relied upon them as a perfect defense to the cause of action, while here the answer disaffirmed and repudiated the sales, expressly averred their invalidity, and alleged that in the month of May, 1892, the various stockholders had been notified by mail that such pretended sales were null, and had no effect upon their rights and that they were entitled to reinstatement, upon payment of actual dues and fines; and the stockholders were further notified that, unless their stock was reinstated upon the terms proposed, a sale of the same would be made on June 23, 1892, pursuant to the by-laws of the association. The court below found that nearly all of the pretended sales had been made in the years 1889 and 1890. It further found that the notice just referred to [409] was issued in the month of May, 1892, by means of a circular letter, in which it was stated that said sales had been declared void by the courts of the state. It is a fair inference that until this circular was promulgated the defendant had persisted in its assertion that the sales were regular and valid; and as the opinion in the Allen case was filed on May 16, 1892, it may also be inferred that the circular was prepared after that date, and was induced by the result of that action. The trial court also found that the present case was commenced June 22d, and that the assignments under which the plaintiffs claim were executed and delivered prior thereto. It was found that on June 23d the stock shares had been sold to defendant, in pursuance of the circular notice, and that, in form, the sale was regular.

We regard this cause as wholly controlled by that of *Allen* v. *American B. & L. Assn.*, 49 Minn. 544; 32 Am. St. Rep. 574. It was said in the opinion therein—and our views remain the same—that the right of action there recognized and upheld was founded upon the fact that there had been a distinct act of dominion wrongfully exercised over the shareholder's property, inconsistent with their rights, and in denial of them. The defendant corporation, by assuming to sell, and wrongfully selling, the shares, deprived the owners of their stock, and the advantages accruing from it, as much when bidding it in for itself as when it accepted the bid of a stranger, and then transferred the title on its books. This, it was said, was an act of interference, subversive of the rights of the stockholders to enjoy and control the stock, and may be

treated by them as a conversion of their property. That any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it, amounts to, and may be treated as, a conversion, was recognized long ago in this court, in *Hossfeldt* v. *Dill*, 28 Minn. 469. The right, then, of the original shareholders, or of these plaintiffs, as their assignees, to maintain this action, was perfect from the day it accrued up to the time that defendant association abandoned its former line of defense, and offered to reinstate—a period of from two to three years. This was settled in the Allen case; so that the present inquiry is solely as to the effect of the offer to reinstate upon an existing and perfect right of action then held by the shareholders [410] or by the plaintiffs, and the offer was nothing more than an offer to return to the rightful owner property already converted to the defendant's use. It was an attempt on the part of the association, after it had actually converted the stock shares to its own use, and had, for the term of from one to three years, denied that the former owners had any interest in the same, to compel them to receive back the converted property against their will. The palpable purpose of the offer to reinstate was to deprive the shareholders of a clear right possessed by each to elect as between remedies—to determine whether their actions should be brought to recover the stock shares in specie, or to recover for the value of the same. If the offer could be given the full effect desired, the defendant would be allowed to perpetrate a wrong; to persist that it had authority so to do; and finally, when defeated in the courts, to take away from the injured party his right to pursue his choice of concurrent remedies. It is safe to say that the option as to remedy is not with the party who has inflicted the injury, for if it were, he would be permitted to take advantage of his own wrong.

It is well settled, as a general proposition, that when an actual conversion of chattels has taken place the owner is under no obligation to receive them back, when tendered by the wrongdoer: 6 Bacon's Abridgment, 677; 9 Bacon's Abridgment, 559; 4 Am. & Eng. Ency. of Law, 125, and cases cited. The right of action is complete and perfect when the conversion takes place, and the object of the action is to recover damages, not to regain possession of the thing itself. Even if the goods be returned by the wrongdoer, and are accepted by the owner, after the action is brought, damages, nominal or actual, may be recovered. There is a class

of cases when, in trespass or trover, the defendant may mitigate the damages by a timely and proper return of the property. The rules which govern in such cases seem to be that where the wrong lacks the element of willfulness—has been committed in good faith—the court, in its discretion, may order a return, upon timely application by the defendant, accompanied by an offer to pay all costs, and a showing that no real injury will have been suffered by the plaintiff when possession is restored. The right of action is not defeated by the order of the court, but damages are mitigated. The subject and the authorities are fully reviewed in *Hart* v. *Skinner*, 16 Vt. 138; 42 Am. Dec. 500. See, also, *Reynolds* [411] v. *Shuler*, 5 Cow. 323, and *Churchill* v. *Welsh*, 47 Wis. 39. We have no such case now before us.

The point is made upon this appeal that it was incumbent upon the plaintiffs to produce and surrender up the stock or share certificates before they could recover: *Joslyn* v. *St. Paul Distilling Co.*, 44 Minn. 183, being the principal authority relied on. But plaintiffs are not asking, as was demanded there, for the cancellation of stock certificates, the transfer of such stock upon the books of the association, and the issuance of new certificates. Nor were the conclusions reached in the Joslyn case adopted on any view of the negotiability of stock certificates, but on general principles appertaining to the doctrine of estoppel. The transfer or assignment of the certificates here involved could give the purchaser no greater rights, as against the association, than the assignors had: *Hammond* v. *Hastings*, 134 U. S. 401.

The remaining points made by counsel for appellant need not be specifically referred to.

Judgment affirmed.

CORPORATIONS—SALE BY OF DELINQUENT STOCK.—A corporation has no inherent power to forfeit or sell shares of stock owned by delinquent stockholders: *Budd* v. *Multnomah etc. Ry. Co.*, 15 Or. 413; 3 Am. St. Rep. 169, and note. Where the charter of a corporation authorizes the sale of stockholders' stock for unpaid assessments, a sale thereof for an illegal assessment is invalid: *Lewey's Island R. R. Co.* v. *Bolton*, 48 Me. 451; 77 Am. Dec. 236. The power of a corporation to forfeit stock given it by charter must be strictly pursued: *Germantown etc. Ry. Co.* v. *Fitler*, 60 Pa. St. 124; 100 Am. Dec. 546, and note.

CONVERSION—OFFER TO RETURN GOODS.—A defendant in trover cannot return the property in mitigation of damages when the taking was willful and the property has been essentially injured, and no return was applied for: *Hart* v. *Skinner*, 16 Vt. 138; 42 Am. Dec. 500, and note. The owner of property converted is not obliged to receive it after the conversion: *Rail-*

road Co. v. *O'Donnell*, 49 Ohio St. 489: 34 Am. St. Rep. 579, and note. See, also, the note to *Greenfield Bank* v. *Leavitt*, 28 Am. Dec. 270, and the extended note to *Bolling* v. *Kirby*, 24 Am. St. Rep. 798.

CONVERSION—WRONGFUL EXERCISE OF DOMINION OVER PROPERTY.—Any distinct act of dominion wrongfully exerted over property in denial of, or inconsistent with, the owner's right amounts to a conversion: *McPheters* v. *Page*, 83 Me. 234; 23 Am. St. Rep. 772; *Bolling* v. *Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789, and extended note at page 796; *Hale* v. *Ames*, 2 T. B. Mon. 143; 15 Am. Dec. 150, and extended note; *Terry* v. *Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note. See, further, the extended note to *Spooner* v. *Manchester*, 43 Am. Rep. 518.

SELOVER *v.* BRYANT.

[54 MINNESOTA, 434.]

WITNESSES—IMPEACHMENT OF BY PARTY CALLING.—A party calling a witness who is surprised by his adverse testimony may, after proper preliminary proof and in the discretion of the court, be permitted to show that he has made previous statements contrary to his testimony.

ATTORNEY AND CLIENT—FEES—CONSIDERATIONS AFFECTING.—The importance and results of a case in which an attorney is engaged, as well as the actual time consumed in the conduct of the suit, must be considered in determining the value of his professional services to his client.

George R. Robinson, for the appellant.

Boardman and Boutelle, for the respondents.

436 DICKINSON, J. The plaintiffs, as attorneys at law, prosecuted an action for a divorce against the defendant and in behalf of his wife. The action was settled between the parties, and dismissed. The plaintiffs prosecute this action to recover for their legal services in behalf of the defendant's wife, claiming that in the settlement of the former suit the defendant agreed with his wife to pay for such services. The defendant denies that agreement. After a verdict for the plaintiffs upon that issue, and the refusal to grant a new trial, the defendant appealed.

The plaintiffs called the defendant's wife as a witness in their behalf. Her testimony tended to refute the claim of the plaintiffs as to the alleged agreement. After a preliminary examination of the witness, as to former contradictory statements made by her, the plaintiffs were allowed to show that she had made a statement of the fact to one of the plaintiffs materially different from her 437 testimony. The case justified the conclusion of the court that the plaintiffs were surprised by the adverse testimony. It is one of the contro-

verted questions in the law of evidence whether a party calling a witness, and who is surprised by his adverse testimony, may be permitted to show that he had made previous statements contrary to his testimony. A learned writer has said that the weight of authority seems to be in favor of admitting such proof: 1 Greenleaf on Evidence, sec. 444. We are in doubt whether the weight of authority is not the other way; but we feel confident that well-recognized reasons and principles of the law of evidence support the proposition that, at least in the discretion of the trial court, such evidence is admissible. It is perfectly well settled, and upon satisfactory reasons, that if the defendant had called the witness to the stand, and she had testified, as she did, as to the fact in issue, the plaintiffs, after proper preliminary proof, would have been allowed to show by other witnesses that she had made statements contrary to her testimony. This rule, now everywhere recognized, rests upon the obvious propriety and necessity of informing the jury of circumstances so directly bearing upon the credibility of the witness and the value of his testimony as do contradictory statements by him of the controverted facts concerning which he testifies, and which the jury must determine. But this controlling reason for allowing such discrediting evidence exists, and with precisely the same force, whether the witness has been called to the stand by the opposite party or by the party who offers the impeaching proof; and if the witness may be thus discredited by the party who did not call him, but may not be discredited by the party who called him, the reason must be that by calling the witness to the stand the party holds him forth as being worthy of credit, and hence he should not be allowed afterwards to impeach his credibility. And this is the proposition which, in one form or another, is generally assigned as the reason of the rule disallowing such impeachment wherever that rule has prevailed. This rule and the reason for it has been so generally accepted and applied, with reference to an impeachment by a party of the general reputation of a witness whom he has called, that it is perhaps not now to be questioned; but as respects the particular discrediting proof which we are considering, the practice has been less uniform, 428 and the excluding of the discrediting proof has been more strenuously opposed by the best authorities. The reason upon which it rests is, we think, plainly fallacious. The fault in the reason lies in the premise that, by calling the witness, the

party presents him as being worthy of credit, or, in any sense, vouches for his truthfulness. In some sense and measure this may be true; but laying aside the subject of general impeachment, and directing our attention only to the question of allowing proof of statements contrary to the testimony by which a party is surprised at the trial, the above-stated reason is of no controlling force, except as it includes and implies such a degree of responsibility for the credit of the witness—such a personal voucher of his truthfulness—that it would be bad faith, double dealing, trifling with the court, or some thing akin thereto, for the party to afterwards throw discredit upon his testimony. The premise is not tenable. A party is not to be held to have assumed any such responsibility as to the truthfulness of a witness, and ordinarily, at least, there can be no imputation of bad faith, or any thing like it, when, the party being surprised by his own witness testifying directly in favor of the adverse party, he offers to show his preliminary statements to the contrary, as impeaching his credibility. One has not all the world from which to choose the witnesses by whose testimony he must prove his case. He has not the freedom of choice that one has in the selection of an agent. He can only call those who are supposed to know the facts in issue. He is entitled to have their testimony placed before the jury, not as the statements of his agents or representatives by which he is to be concluded, but as the testimony of witnesses whose credibility he cannot be expected to vouch for, but which the jury are to determine. It is everywhere admitted that a party whose witness testifies against him is not concluded thereby. He may prove the fact to be contrary to such testimony, although that does discredit a witness whom he has called. We deny that, by calling a witness to the stand a party becomes responsible for his credibility in any such sense that he is absolutely precluded, when surprised by adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. It is at least within the discretion of the court to allow this.

430 It has been suggested that this affords an opportunity to fraudulently get before the jury the unsworn statement of a witness which the jury may accept as evidence of the fact. But the same objection may be urged in opposition to allowing a party to discredit in this way a witness called by the adverse party; yet this is always allowed. The direct, cer-

tain, and obvious effect of such evidence, in enabling the jury to rightly weigh the testimony, should prevail over the far more remote, improbable, and collateral considerations that opportunity may be thus afforded to a dishonest party to collude with a dishonest witness to make a false statement of facts, which the witness would not swear to, in order that, after the witness shall have testified to the truth, the false, unsworn statement to the contrary may be shown. There are so many contingencies in the way of such barely possible results that the remote possibility is not of much weight, as against the plain practical considerations opposed to it. While, perhaps, the weight of authority is in favor of excluding such evidence, we feel that, in holding it to be within the discretion of the court to receive it, we are justified, not only by reason, but by a sufficient array of authority. In the English courts both views have been sanctioned. A strong presentation of the rule allowing such proof was made by Lord Chief Justice Denman in *Wright* v. *Beckett*, 1 Moody & R. 414. This view is preferred in Starkie on Evidence, Sharswood's ed., 245; 2 Phillipps on Evidence, marg. pp. 985–995; 1 Greenleaf on Evidence, 444; *Cowden* v. *Reynolds*, 12 Serg. & R. 281, 283; *Bank of the Northern Liberties* v. *Davis*, 6 Watts & S. 285; *Smith* v. *Briscoe*, 65 Md. 561; *Campbell* v. *State*, 23 Ala. 44, 76; *Hemingway* v. *Garth*, 51 Ala. 530; *Moore* v. *Chicago etc. R. R. Co.*, 59 Miss. 243; and see *Johnson* v. *Leggett*, 28 Kan. 590, 606. See, also, a discussion of this subject in 11 Am. Law Rev. 261. It may be added, as indicating what it has been considered the rule ought to be, that in England and in several of our states statutes have been enacted allowing such proof to be made. Our conclusion on this point is that the court did not err in receiving the evidence.

The only other assignments of error which we deem worthy of specific mention are those relating to the charge of the court that the value of the services (of the plaintiffs) "to Mrs. Bryant" should be considered by the jury. There was no error in this. The court [440] did not say that that consideration alone should be taken as the measure of value. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. Among other things, the importance and results of the case are to be con-

sidered. The importance of the cause to the client affords to some extent a measure of the skill, care, responsibility, anxiety, and effort demanded of and to be borne by the attorney, and should not be disregarded in their bearing upon the question of the value of such services: *Eggleston* v. *Boardman*, 37 Mich. 14.

The seventh assignment of error—that the court erred in overruling the motion for a new trial—is too general to be available.

Order affirmed.

GILFILLAN, C. J. On the point of the admissibility of the evidence of contradictory statements made by the witness Bryant, I dissent.

WITNESSES—IMPEACHING ONE'S OWN.—If a witness testifies to facts injurious to the party who introduces him, such party may impeach such witness by proving that he had made statements contradictory to his testimony: *Thompson* v. *State*, 29 Tex. App. 206; *Schuster* v. *State*, 80 Wis. 107; *Hurley* v. *State*, 46 Ohio St. 320; *Langford* v. *Jones*, 18 Or. 307; *Miller* v. *Cook*, 127 Ind. 339; *Omaha etc. Smelting etc. Co.* v. *Tabor*, 13 Col. 41; 16 Am. St. Rep. 185, and note; *State* v. *Norris*, 1 Hayw. (N. C) 429; 1 Am. Dec. 564, and note; *Bennett* v. *State*, 24 Tex. App. 73; 5 Am. St. Rep. 875, and note. While a witness cannot be impeached by the party calling him, still such party may prove the truth by other witnesses, even though they contradict the witness first called: *Blackwell* v. *Wright*, 27 Neb. 269; 20 Am. St. Rep. 662; *Olmstead* v. *Winsted Bank*, 32 Conn. 278; 85 Am. Dec. 260, and note; *Cox* v. *Eayres*, 55 Vt. 24; 45 Am. Rep. 583; *Champ* v. *Commonwealth*, 2 Met. (Ky.) 17; 74 Am. Dec. 388, and extended note; *Cross* v. *Cross*, 108 N. Y. 628. See, also, the extended note to *Burkhalter* v. *Edwards*, 60 Am. Dec. 749.

ATTORNEYS' FEES—CONSIDERATIONS AFFECTING.—It is competent to show the amount involved in suits for the management and trial of which an attorney brings suit, because the amount involved in the issues has much to do with the value of the services rendered and the responsibility assumed by the attorney: *Babbitt* v. *Bumpus*, 73 Mich. 331; 16 Am. St. Rep. 585, and note.

HOKANSON *v.* GUNDERSON.

[54 MINNESOTA, 499.]

LIS PENDENS AS NOTICE.—In an action to enforce a mechanic's lien, a notice of *lis pendens* filed is not binding upon one claiming an interest in the premises, unless he is a party to the action served with summons or voluntarily appearing therein, or claiming under one who was made a party during the life of the lien. Mere notice of the suit does not affect him unless he is thus actually made a party.

LIS PENDENS—EFFECT ON FORECLOSURE PURCHASER.—A purchaser at mortgage sale is not bound by an action against the mortgagor involving the title to the mortgaged premises, nor by a *lis pendens* filed in such action, when neither such purchaser nor the mortgagee is made an actual party until after such foreclosure.

LIENS—DEFENSES.—One who may defend against a lien may object that the lien had expired, or the remedy upon it was lost, before the action was commenced against him.

MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASER.—A purchaser at foreclosure sale succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure.

MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASER.—A purchaser at foreclosure sale is only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee. The purchaser's rights are not affected by liens adjudged against the mortgagor in a suit commenced subsequently to the date of the mortgage to which neither he nor the mortgagee is a party.

Lewis and Hallam, for the appellants.

Stiles W. Burr, for the respondent.

500 VANDERBURGH, J. This action was brought to foreclose a mechanic's lien against defendant John A. Gunderson, who is the owner of the land. Defendants Elliott and Burnham are separate mortgagees, and defendant Holm J. Gunderson was the contractor engaged in erecting a building upon the premises. Finlayson & Co. were other lien claimants, joined as defendants, and the question presented by this appeal arises between the last-named claimants and the respondent Mary Marvin, who claims under a foreclosure 501 sale of the Burnham mortgage, and insists that her rights secured thereby are superior to the lien of Finlayson & Co. They furnished materials for the building in question, and the date of the last item furnished was March 7, 1891.

The mortgage to Burnham was recorded in February, 1891. This action was commenced in August, 1891, and at the same

time the plaintiff, Hokanson, filed a notice of *lis pendens*, stating the object of the action to be the foreclosure of a mechanic's lien upon the premises described in the complaint. The mortgagees, Burnham, were not served with process in the action till March 7, 1892, and prior thereto, on the 26th of February, 1892, that mortgage was foreclosed by advertisement by a sale of the premises under the power therein to the defendant Marvin, and a certificate of sale duly executed and delivered to her, which was filed for record on the fourteenth day of March, 1892; and such proceedings were afterwards had in this action that she was made a party and was served with a summons therein on the twenty-eighth day of April, 1892. The action was not commenced against defendant Marvin within one year after the date of the last item on the account for labor and materials of any of the lien claimants in this action.

The appellants, however, base their claim for preference substantially upon two grounds: 1. The defendant Marvin was bound by the record of the notice of *lis pendens* when she purchased at the mortgage sale, as if she had been a party to the action; and 2. That she must be held to take under the mortgagor, and to hold subject to the liens adjudicated in the action against him pending at the date of the foreclosure.

At the time of the foreclosure of the Burnham mortgage the mortgagees had not been served with process, and were not bound by the record of the notice of *lis pendens*, because the action was not commenced or pending, as to them, until they were served or had voluntarily appeared therein; and hence defendant Marvin might as well have taken under one who was an entire stranger to the record, and therefore, as respects the mortgagees, she was not bound by the pendency of the action, as if claiming under a party thereto. It is not material at all whether the defendant Marvin had actual notice of the suit, unless she could be legally bound by the adjudication therein. Notice avails nothing unless or until [illegible] the party receiving it, or the party under whom he claims, has an opportunity to have his rights litigated and determined.

Of what avail is it to these appellants that the respondent had notice of his lien and its priority, unless the suit in which the dispute may be determined is instituted within the life of their lien? If the respondent claims under the Burn-

hams, and the suit was instituted against them before the transfer to her of their interest, then by virtue of the notice of the pendency of the action the determination of the suit would be binding on her. But, if such interest was acquired before they were made parties, then there has not been any suit involving the rights of these parties instituted or pending prior to the expiration of the time allowed by law for the determination of the lien of the appellants; and the question of notice, actual or constructive, is entirely immaterial: *Burbank* v. *Wright*, 44 Minn. 544. Any one who may defend against a lien may object that the lien had expired, or the remedy upon it lost, before the action was commenced against him: *Smith* v. *Hurd*, 50 Minn. 503; 36 Am. St. Rep. 661. The position of the appellants is the same in this respect as if they had themselves brought the original action: *Sandberg* v. *Palm*, 53 Minn. 252.

In respect to the suggestion that the certificate of sale upon the foreclosure was not executed until the mortgagees had been made parties, the court finds that the mortgage was duly foreclosed, and that the premises were sold to defendant Marvin on the twenty-sixth day of February, 1892, for the sum of six hundred and ninety-six dollars and eighty cents, and that the sheriff thereupon made and delivered to this defendant his certificate of such sale, which was subsequently recorded on March 14, 1892. It was seasonably recorded under the statute, and, even if the certificate was not formally delivered until the date of its acknowledgment, March 12, 1892 (which is not found), still the presumption is that it was a cash sale, and the rights of the purchaser attached as of the date of the sale. And the delay of the sheriff in executing the certificate could not impair that right; and, if necessary, the aid of the courts could be invoked to enforce the right to a certificate on one side or the payment on the other: *Armstrong* v. *Vroman*, 11 Minn. 220; 88 Am. Dec. 81.

The evidence offered by appellants does not show that the consideration 503 was not paid, and is insufficient to impeach the recital in the certificate or the finding of the court.

A further point urged by appellants is that the respondent purchased the title of the mortgagor, who is a party to the suit, and for that reason holds subject to their lien. In other words, upon the foreclosure of a mortgage the purchaser does not take through the mortgagee, but succeeds to the title of the mortgagor by virtue of the sale; and hence the latter

must be deemed a party to the suit whose interest she purchased *pendente lite*.

The interest of the purchaser at a mortgage sale in this state during the redemption period is somewhat anomalous. But he is certainly a necessary party to a suit affecting the interest of the mortgagee, unless the latter is made a party, and it is not sufficient that the mortgagor alone is joined.

The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser is, then, only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee. His rights are not affected by liens adjudged against the mortgagor in a suit in which neither he nor the mortgagee is a party. The result is that the defendant Marvin was not seasonably made a party to this action, and did not take under any one who was such at the time she purchased.

Judgment affirmed.

MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASERS AT.—Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time when the mortgage lien was created: *Batterman* v. *Albright*, 122 N. Y. 481; 19 Am. St. Rep. 510, and note; *Boggs* v. *Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Goodenow* v. *Ewer*, 16 Cal. 461; 76 Am. Dec. 540, and note. See, also, the notes to *Ahern* v. *Freeman*, 24 Am. St. Rep. 209, and *McMillan* v. *Richards*, 70 Am. Dec. 676.

MORTGAGES—FORECLOSURE SALE—INTEREST OF PURCHASER.—A purchaser at a foreclosure sale of mortgaged premises acquires the interest of the mortgagee in the lands, and is subrogated to all his rights: *Frisbie* v. *Kramer*, 16 Ohio, 125; 47 Am. Dec. 368, and note. To the same effect see *Bozarth* v. *Largent*, 128 Ill. 95.

LIS PENDENS.—TO WHOM NOTICE: See the extended notes to *Parker* v. *Conner*, 45 Am. Rep. 187, and *Newman* v. *Chapman*, 14 Am. Dec. 777.

CASES

IN THE

SUPREME COURT

OF

MISSOURI.

STATE *v.* WILLIAMSON.

[118 MISSOURI, 146.]

OFFICERS—ASSIGNMENT OF UNEARNED SALARY.—A contract for the sale and collection of the future salary of his office by a public officer is contrary to public policy and void.

OFFICERS—ASSIGNMENT OF UNEARNED SALARY—EMBEZZLEMENT.—A contract of sale by a public officer of his unearned salary by which he agrees to act as the agent for the purchaser in its collection when due is void. If he afterwards collects such salary and converts it to his own use he does not commit embezzlement.

L. F. Bird and A. F. Smith, for the appellant.

R. F. Walker, attorney general, Marcy K. Brown, prosecuting attorney, and J. J. Williams, assistant prosecuting attorney, for the state.

[149] BURGESS, J. At the January term, 1893, of the Jackson criminal court, the defendant was indicted, charged, under the first count, as agent of John Mulholland, with embezzling the sum of one hundred and seven dollars; under the second, with grand larceny of the same sum. At the same time he was arraigned and entered his plea of not guilty, and the cause was continued until the April term, 1893.

At said April term he filed a demurrer to the indictment, which was by the court overruled, whereupon he was tried, convicted, and his punishment assessed at imprisonment in the penitentiary for a term of two years. After unsuccessful motions for new trial and in arrest he appealed to this court.

The facts in this case are that, in November, 1892, the

defendant was employed as a mail carrier in the postoffice department at Kansas City, Missouri, at a salary of about one hundred and seven dollars per month. November 30, 1892, defendant sold to John Mulholland the salary he would earn for the month of December for one hundred dollars, giving an order to Mulholland on the postmaster for that sum. Then, to prevent the postmaster from learning of the loan, Mulholland appointed defendant his agent to collect the same. Defendant afterward sold the same salary to other parties, and when it became due collected it from the government and refused to pay it over to Mulholland.

[159] The contract between the defendant and Mulholland which was read in evidence by the state, is as follows:

"KANSAS CITY, MISSOURI, November 30, 1892.

"MR. F. B. NOFSINGER, POSTMASTER: For value received, I have this day assigned and sold to John Mulholland the amount due me for labor performed or to be performed during the month of December, 1892, in carrier department, and said Mulholland is authorized to execute such receipts as you may require, and also to indorse warrant (or check) in my name. I further state that I have no cause to believe that I will not earn the salary so sold, and have no indication or knowledge of being discharged. I also agree that it is a part of this contract, that if for any reason I fail to earn full salary of $——, that this assignment and order for warrant (or check) shall continue in full force for the month of ——, 189—, and until said amount of $—— has been earned. I read the above before signing.

"Respectfully,

"J. A. WILLIAMSON."

The vital question in this case and the one upon which this prosecution and conviction must stand or fall is as to the validity of the contract between the defendant and Mulholland. If the contract was void because against public policy, then the defendant must be discharged, not being guilty of any criminal offense under the statute.

It will be observed in the outset that the contract was for the sale of the unearned salary of defendant as mail clerk in the United States postoffice at Kansas City, Missouri, for the month of December, 1892. The rule of law is well established in England that such contracts are absolutely null and void as being against public policy. This subject was

under review in the [151] case of *Bliss* v. *Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, where all the authorities, both English and American were reviewed, and it was held that the assignment by a public officer of the future salary of his office is contrary to public policy and void: See, also, *Schwenk* v. *Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438; *Field* v. *Chipley*, 79 Ky. 260; 42 Am. Rep. 215; *Beal* v. *McVicker*, 8 Mo. App. 202.

It will also be observed that in the cases of *Brackett* v. *Blake*, 7 Met. 335; 41 Am. Dec. 442; *Mulhall* v. *Quinn*, 1 Gray, 105; 61 Am. Dec. 414; and *Macomber* v. *Doane*, 2 Allen, 541, which are sometimes referred to as announcing a different rule, the point of public policy was not considered by the court in either of them, but that the questions involved in them were regarded as relating altogether to the sufficiency of the interest of the assignor in the future unearned salary to distinguish the cause from those of attempted assignment of mere expectation, such as those of an expectant heir. The court held in these cases, the expectation of future unearned salary being founded on existing engagements and contracts of employment, was capable of assignment, and that the existing interest was sufficient to support the transfer of the future unearned salary.

The case of *State* v. *Hastings*, 15 Wis. 75, seems to announce a somewhat similar rule, but as in that case the order for the unearned salary, with authority to collect the same, had been transferred to an innocent purchaser, the case turned principally on the question of estoppel. The question as to whether or not the assignment of the unearned salary was against public policy was not raised or discussed in that case either.

The reason of the rule is that the public service may not be so good and efficient when the unearned salary has been assigned as when it has not been, and "that the public service is protected by protecting [152] those engaged in the performance of public duties," and this, not upon the ground of their private and individual interest, but that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment: *Bliss* v. *Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273.

If an officer can assign his unearned salary for a month he can, of course, assign it for a year, or longer, and it will

hardly be contended in such case that he would be as efficient and diligent as if he were to receive his salary in person or for his own benefit as it became due. For these reasons we think the contract for the sale and collection of the unearned salary of defendant void and of no effect, being against public policy.

It is, however, contended by the attorney general for the state that, even admitting that the assignment was void, yet, as defendant collected the money for and as the agent of Mulholland, he is guilty of the crime for which he stands convicted, and cites as sustaining this position: *State* v. *Shadd*, 80 Mo. 358; *Commonwealth* v. *Cooper*, 130 Mass. 285; *Commonwealth* v. *Rourke*, 10 Cush. 397; *State* v. *Tumey*, 81 Ind. 559; and Dunlap's Paley's Agency, 62. An examination of these authorities will show that they were all cases where the money or property which the defendants were charged with stealing or embezzling as agents was where the transaction out of which they grew and the money paid were illegal; and the law in such cases is that if money has actually been paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands nor divest him of his right thereto. But no such state of facts exists in the case at bar. [153] Here the salary was legally earned and to be earned, but the attempted assignment thereof was void. The defendant then, was never divested of his right to collect for himself and in his own right, and was not the agent of Mulholland in so doing. If there was no assignment, and we hold there was none, he was not the agent of Mulholland, but acted for himself in collecting the money.

As for the morals of the transaction, in so far as the defendant is concerned, they are certainly not to be approved or commended; but dishonest and dishonorable conduct does not always constitute a criminal offense.

There are other questions raised by counsel for defendant in their brief; but, as the result reached necessarily results in a reversal of the judgment, it is not thought necessary to pass on them. The judgment will be reversed and defendant discharged. All concur.

ASSIGNMENT OF UNEARNED SALARY BY PUBLIC OFFICER.—An assignment of the salary of a public officer before it is earned is void as against public policy: *Bliss* v. *Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Bowery Nat.*

Bank v. *Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507. The assignment of the unearned pay of a retired officer of the United States army is void as being against public policy: *Schwenk* v. *Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438. See the extended note to *Skipper* v. *Stokes*, 94 Am. Dec. 650, and the note to *Brackett* v. *Blake*, 41 Am. Dec. 444.

STATE *v.* BRANDENBURG.

[118 MISSOURI, 181.]

EVIDENCE—PROOF OF GOOD CHARACTER.—A witness may base his knowledge of the person whose character is in question upon the fact that the witness has never heard any thing against the character of such person.

SEDUCTION—INTENT TO MARRY.—In a prosecution for seduction under promise of marriage, the fact that the defendant intended to marry the prosecutrix is immaterial.

SEDUCTION—COMPETENCY OF DEFENDANT AS WITNESS.—When, on a trial for seduction, the defendant testifies only to immaterial matter, the failure of the court to instruct as to his competency, and the weight to be given to his testimony, is not error.

SEDUCTION—OBJECTIONABLE REMARKS BY COUNSEL.—In a prosecution for seduction, the fact that the prosecuting attorney makes objectionable remarks outside the record in his argument is not reversible error if the court at the time stopped and rebuked him, directing him to confine his remarks to the record and the facts in proof.

Edmonston and Cullen, for the appellant.

R. F. Walker, *attorney general*, for the state.

183 BURGESS, J. The defendant was convicted in the circuit court of Montgomery county for seducing and debauching one Mattie Owens, an unmarried female of good repute, and under eighteen years of age. The case is in this court on his appeal.

184 The facts developed by the testimony are, that during December, 1890, and January, 1891, defendant boarded at the home of the prosecutrix, at Danville, Montgomery county, Missouri; that defendant and the prosecutrix were engaged to be married. The prosecutrix testified that on December 26th defendant asked her to have sexual intercourse with him. She replied: "It was not right" when he said: "It would n't be no harm; we are engaged"; and she then consented; that they had sexual intercourse twice during January, 1891, and each time they had about the same conversation; that the parents of the prosecutrix refused to permit defendant to come to the home of the prosecutrix, and refused

to permit her to marry defendant; that defendant always expressed a willingness to marry her, and never refused. The mother of prosecutrix testified that she forbade her daughter marrying defendant, and ordered him not to come on the place again; that she told her daughter she had rather see her dead than marry defendant; that she and her husband offered to settle the case for less than one hundred dollars. Letters written by defendant to prosecutrix were identified and read in evidence, in which defendant renewed his offer to marry her. The testimony gives the prosecutrix a good reputation for chastity and virtue.

The indictment is well enough and good under the section of the statute under which it was drawn, containing, as it does, all necessary averments: *State* v. *Eckler*, 106 Mo. 585; 27 Am. St. Rep. 372; *State* v. *Primm*, 98 Mo. 368.

It is contended by counsel for defendant that the court committed error in allowing the witnesses, MacMahan and Bellamy, to testify to the reputation of the prosecutrix, because they were not qualified to do so. This contention is not sustained by the record, which discloses the fact that each one of these witnesses testified that he was acquainted with [185] Mattie Owens; one of them, Bellamy, that she went to school to him in 1890, and they both testified that they had never heard any thing against her. In passing upon a similar question by this court, Sherwood, J., said: "That reputation may, with justice, well be called good which no slanderer has ever ventured to even so much as question. A blameless life oftentimes, though not always, gives origin to such a reputation. But when it can be said of a man by those well acquainted with him that they never heard his reputation as to truth and morals discussed, denied, or doubted, it is equivalent to passing upon him the highest encomium. The authorities abundantly establish that the person testifying need not base his knowledge on what is 'generally said' of the person whose character is in question, but may base his knowledge of the reputation of such person on evidence of the negative nature above noted": *State* v. *Grate*, 68 Mo. 22, and authorities cited.

Defendant was introduced as a witness in his own behalf, and asked whether or not it was his honest intention to marry the prosecuting witness, if he had always held himself in readiness and willing to marry her, and if he was not then ready and willing to do so. These questions were all objected

to by the state, the objections sustained, and the defendant duly excepted. It is urged with much earnestness that the court should have permitted these questions to be answered, as the answer thereto would have shown that defendant acted in good faith in promising to marry Mattie Owens, and was not guilty of any deception in promising to do so. It is the act of seducing and debauching which is the *gravamen* of the offense, and, if this is done by promises of marriage, the crime is complete, no matter what the defendant's intentions may have been, or what offers he may have made after the act was consummated. [186] Section 3486 of the Revised Statutes provides that, "If any person shall, under or by a promise of marriage, seduce and debauch any unmarried female of good repute, under eighteen years of age, he shall be deemed guilty of a felony; but if, before judgment upon an indictment, the defendant marry the woman thus seduced, it shall be a bar to any other prosecution of the offense, but an offer to marry the female seduced by the party charged shall constitute no defense to such prosecution." While by the plain provisions of the statute marriage by the defendant of the female seduced before judgment is a bar to the prosecution, the mere offer to do so is not.

This position finds support in the case of *State* v. *Bierce*, 27 Conn. 319, where, under a statute like the Missouri statute, it is said:

"The proposition that a virtuous and innocent female, who has been persuaded by a man to surrender her chastity to him by a promise of marriage, which is the strongest temptation that could be offered to prevail upon her to part with her innocence, and in which she implicitly confided, is not, although such promise was made honestly and with an intention to perform it, within the protection intended by the statute on which this information is founded, is, on the statement of it, so absurd that we deem it unnecessary formally to refute it. Is it less a seduction that it was accomplished by the most powerful inducement which could be offered to his victim, or that such inducement consisted of a promise which was intended to be performed?"

Moreover, the prosecuting witness testified that although the defendant always expressed a willingness to marry her, and never refused to do so, she never saw or heard of him after the fifth day of July, 1891, until after his arrest, when he wrote her.

187 The court, in defining "good repute," as used in the statute, adopted the same definition as did this court in the case of *State* v. *Wheeler*, 108 Mo. 658, which we are satisfied is correct, and according to the meaning as those words are used in the statute.

Another contention is, that the court should have instructed the jury that defendant was a competent witness in his own behalf and the weight to be given to his testimony, although no such instruction was asked by him. A sufficient answer to this contention is that the only matters that defendant testified to were that as to his name, and that he had promised to marry the prosecuting witness. Certainly there was no error under such a state of facts in the failure of the court to instruct as to his competency, and the weight to be given to his testimony, as it was of no consequence or importance.

There was no error in refusing to give the instructions prayed for by defendant; the first and third embodied the good faith on the part of the defendant in promising to marry Mattie Owens, which was not the law as hereinbefore stated, while the second was substantially given in the other instructions given on the part of the state.

During the argument before the jury on the merits of the case, one of the attorneys for the state remarked, "that the return of the writs by the officers showed that the defendant run away or skipped out, and that the prosecuting witness had to work in a tobacco factory to support herself and child." Counsel for defendant objected to such remarks, and the court then stopped the attorney, rebuked him, and directed him to confine his remarks to the record and facts in proof. This is all that the court could do, and all that was required. We are justified in assuming that the rebuke of the court warned the jury to 188 disregard the statements: *State* v. *Lee*, 66 Mo. 165; *State* v. *Finn*, 24 Mo. App. 344.

As there is no error in the record which will justify a reversal of the cause, the judgment will be affirmed, and it is so ordered. All concur.

EVIDENCE—CHARACTER—PROOF OF.—When character is in issue it may be shown only by evidence of general reputation and not by proof of specific acts: *Miller* v. *Curtis*, 158 Mass. 127; 35 Am. St. Rep. 469, and note, with the cases collected. See, also, the notes to *O'Bryan* v. *O'Bryan*, 53 Am. Dec. 134; *Wachstetter* v. *State*, 50 Am. Rep. 98, and *Douglass* v. *Tousey*, 30 Am. Dec. 620.

SEDUCTION—OFFER TO MARRY AS DEFENSE.—GOOD FAITH OF DEFENDANT: See *Wright* v. *State*, 31 Tex. Cr. Rep. 354; 37 Am. St. Rep. 822, and note.

APPEALS IN CRIMINAL CASES.—IMPROPER ARGUMENT OF STATE'S ATTORNEY AS GROUND FOR REVERSAL: See *Weatherford* v. *State*, 31 Tex. Cr. Rep. 530; 37 Am. St. Rep. 828, and note, with the cases collected.

SWADLEY *v.* MISSOURI PACIFIC RAILWAY CO.

[118 MISSOURI, 268.]

MASTER AND SERVANT—FELLOW-SERVANTS.—A railroad track repairer and the employees in charge of regular freight and passenger trains belonging to the same master are not fellow-servants.

MASTER AND SERVANT—EMPLOYER AS TRESPASSER.—A railroad track-repairer, walking on the company's right of way with other employees, after the usual working hours, for the purpose of taking a train to the next working place, is not a trespasser.

RAILROADS—NEGLIGENCE TOWARDS SERVANT.—When a railroad car jumps the track and injures a track-repairer while standing on the side of the track under orders from his foreman, the company is liable if the accident is caused by a negligently defective track, or by reason of the fact that the train is not run in an ordinarily safe and prudent manner, and knowledge by such track-repairer of the defective condition of the track, while a circumstance tending to show contributory negligence in not getting further away from the track as the train passed, does not of itself, and as matter of law, defeat his right to recover.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF EMPLOYEE—DEFECTIVE APPLIANCES.—Mere knowledge of a railroad employee that an appliance owned by the company is defective, and that risk is incurred in its use, does not, as matter of law, defeat the employee's action when the danger is not such as to threaten immediate injury, or when it is reasonable to suppose that the appliance may be safely used by the exercise of care and caution.

RAILROADS—DEFECTIVE TRACK.—Evidence of the defective condition of railroad ties within a reasonable time before and after an accident on the track is competent as tending to show their condition at the time of the accident. The limitation to such evidence is that it must be such in character and point of time as to justify the inference that the ties were in bad condition when the accident occurred.

H. S. Priest and W. S. Shirk, for the appellant.

W. M. Williams, J. H. Johnston, and J. E. Hazell, for the respondent.

272 BLACK, P. J. The plaintiff, a young man under the age of twenty-one years, prosecutes this suit by his next friend to recover damages for personal injuries. There is no dispute as to the following facts:

The plaintiff was one of a gang of six or eight [273] men, engaged in repairing the track of the defendant's branch road from Tipton to Boonville, all under the control of David Reed, their foreman. On Saturday, the day of the accident, they were engaged in loading old rails on what is called the work train. They ceased work between five and six o'clock in the afternoon, a little earlier than usual, and went to their boarding-house, which was close to what is called the McAllister crossing, for their supper. In the mean time the work train went north to Boonville, to clear the track for a regular passenger and freight train, which was known to be about two hours behind its usual time. After supper Reed and his gang got their valises, intending to get upon the work train when it came back and go to Tipton, and from there to California on the main line, where they were to commence work on Monday morning. They all concluded to walk from the McAllister crossing south to a station called Speed, and there take the work train. While walking along the track they saw the passenger and freight train coming from the south, and they all stepped from the track to the right of way, some going on one side of the track and some on the other. As the train was passing them some of the cars were thrown from the track onto the plaintiff and others, killing at least two of the men and injuring the plaintiff. There was a sharp curve at this point.

The plaintiff founds his action on these averments, namely: That he was on the right of way by order of his foreman; that the defendant negligently suffered its roadbed and track thereon to become unsafe and dangerous at the point of the accident, in these respects: the ties were decayed and rotten, the rails were badly worn and not properly fastened to the ties, and the outer rail of the curve did not have sufficient [274] elevation; that the passenger and freight train was run and operated at a dangerous and reckless rate of speed; and that the cars were thrown from the track and upon plaintiff because of the unsafe condition of the track and dangerous rate of speed of the freight and passenger train.

The evidence of the plaintiff is very strong to the effect that Reed ordered his men to go from the McAllister crossing to Speed, and pick up the tools as they went along, and take the work train at that place for California, and that they walked along the track as they did because of the order of Reed, their foreman. On the other hand, Reed says he told his

men they would get their supper and wait at the crossing for the train, and this was the order he had from the division superintendent. He says when they got to the crossing he, or some of the men, suggested that they walk down to Speed and get on the train at that place, and accordingly they all started for Speed, walking on the track. Says he was not on duty at that time, it being after six o'clock.

There is much evidence tending to show that the ties were from two to two and a half feet apart, that some of them were of the usual size, and others smaller, that many of them were rotten so they would not hold a spike, and that the lines of the track varied from right to left and the rails were not level on top. Other evidence shows that the plaintiff and his gang replaced the inner rail of the curve with steel rails a few days, less than a week, before the accident. The steel rails were rails which had been used on the main track. The outside rail of the curve was steel and had been down a much longer time. The defendant's evidence is that a gang of men went over this track three or four weeks before the accident and put in some new ties, that while most of the ties had been in the ground [275] some years, they were reasonably sound. In short, the defendant's evidence and some of that produced by the plaintiff tends to show that this roadbed and track was in as good a condition as branch roads are usually kept.

According to most of the witnesses the train was going from twenty-three to thirty miles per hour, and the evidence of those in charge of it is that the same train had been run that fast over this part of the road before the accident and has been run as fast since then. One witness who was a passenger says the train was running as fast as thirty-five miles per hour, and another one says it was running twice as fast as he ever saw it run before, and that one of the freight-cars was thrown thirty or forty feet from the track.

It appears the car which caused the wreck left the track just as the train passed through the curve. Several witnesses say it had one wheel broken off, and the break at the axle had the appearance of being a fresh one. They gave it as their opinion that this break caused the wreck. They say such accidents occur without any apparent cause.

The chief complaints made on this appeal by the defendant arise out of the rulings of the trial court, in overruling the defendant's objection to the introduction of any evidence

because the petition failed to state facts sufficient to constitute a cause of action; and in overruling the defendant's demurrer to the plaintiff's evidence.

1. The first of these objections made here is, that the plaintiff and those in charge of the passenger and freight trains were fellow-servants within the rule which exempts the master from liability where one servant is injured by the negligence of a coservant. This objection has nothing to do with the plaintiff's cause of action so far as it is founded on a defective roadbed [376] and track. The objection, however, was not well taken in any point of view or at any stage of the trial. It is true all servants of the same master are *prima facie* coservants within the rule, but the conceded and unquestioned facts in this case show affirmatively that the plaintiff was engaged in repairing the track under the orders of his foreman. The train was a regular freight and passenger train, under the command of a conductor. These facts show that the plaintiff and those in charge of the train were not fellow-servants, under our rulings. There are cases where it will become necessary to submit the question to the jury, but that is not the case here. All the facts bearing upon the point are conceded.

This case is unlike *Parker* v. *Hannibal etc. R. R. Co.*, 109 Mo. 362. There the train was engaged in hauling ballast which Parker and others placed upon the track. The evidence was not clear as to what, if any, relation existed between the track-repairers and trainmen. Here the facts which take the plaintiff out of the rule as a matter of law are conceded.

2. It does not follow that the plaintiff was a trespasser because he was on the right of way after the usual working hours. He was there with the foreman and the other members of his gang, all going to the station to take the work train for the next working place, and there is an abundance of evidence tending to show that the plaintiff and others went down to the track to the station pursuant to the orders of their foreman, for the purpose of gathering up the tools on the way. Under these circumstances this court cannot say plaintiff was a trespasser. No case cited has any tendency to justify such a ruling.

But it is said the defendant owed the plaintiff no duty, either as to the condition of its track or the speed of the train, even if he is to be deemed and treated as [377] an

employee, and for this reason the demurrer to the evidence should have been sustained. To this proposition we do not agree. It is certainly the duty of the master to use reasonable care in supplying his servants with reasonably safe machinery and appliances, and to use reasonable diligence in keeping them in repair. And the plaintiff not being a coservant with those in charge of the train and being an employee, it was the duty of the defendant to use ordinary care in running the train. The rule upon both of these propositions is correctly stated in the instructions given in this case at the request of the defendant. It is there in substance stated that if the plaintiff was on the side of the track by order of the section boss, and the car jumped the track and fell upon him, still he could not recover if the track was in an ordinarily safe condition, and the train was being run in an ordinarily safe and prudent manner.

3. There was certainly an abundance of evidence tending to show that the track was in an unsafe condition, by reason of rotten ties and rails insecurely fastened, and that in view of this condition of the track, the train was running at a negligent rate of speed. From the circumstances put in evidence the jury could well draw the conclusion that the cars left the track for one or the other of these reasons, or both combined. It is true there is evidence tending to show that the wreck was caused by a broken axle, and there is also evidence tending to show that the axle was broken by reason of the speed of the train over a rough road. These points are, however, covered by instructions given at the request of the defendant.

But it is said the plaintiff ought not to recover because he had within a week assisted in taking up the old rails and in putting down others at this place, and therefore knew of the condition of the track, and hence [378] assumed all risks arising from its defective condition. The fact that he knew of the defective condition of the track was a circumstance going to show that he was guilty of contributory negligence in not getting further away from the track when the train passed him, but it does not, in and of itself and as a matter of law, defeat a recovery. Mere knowledge that the appliance is defective and that risk is incurred in its use will not, as a matter of law, defeat the servant's action where the danger is not such as to threaten immediate injury, or where it is reasonable to suppose the appliance may be safely used

by the use of care and caution: *Hamilton* v. *Rich Hill Coal Min. Co.*, 108 Mo. 364, and cases cited.

4. William Atkinson, a witness for plaintiff, stated that he passed over the road from the 1st to the 7th of August, 1881. The accident in question occurred on the 1st of September of that year. The witness then stated, over the objections of the defendant, that the ties were in a bad condition, which condition he described. On cross-examination he said he did not know what condition the ties were in on the 1st of September.

The defendant objected to the evidence of this witness for two reasons: 1. Because it then appeared in evidence that the track had been repaired only a few days before the accident; and 2. Because the condition of the track from the 1st to the 7th of August was immaterial.

At the time this witness was called, the plaintiff's evidence showed that the track had been repaired by placing a steel rail on the inside of the curve, but there was no evidence to show that any change had been made in the ties. Indeed, two of the witnesses being section-men belonging to plaintiff's gang, had testified that they did nothing with the ties; that they laid the [279] rails down on the old ties. There is, therefore, nothing in the first objection to call for further observation.

With respect to the other objection, it is to be observed that the inquiry was, What was the condition of the ties at the time of the accident? But it was not necessary that the witnesses should be able to speak of the condition of the ties on that very day. Evidence of the condition of the ties within a reasonable time before or after the accident was competent. The limitation to such evidence is that it must be such, in character and point of time, as to justify the inference that the ties were in a bad condition at the time of the accident: *Stoher* v. *St. Louis etc. Ry. Co.*, 91 Mo. 509. Indeed, it was said in *Stewart* v. *Everts*, 76 Wis. 35, 20 Am. St. Rep. 17, the case, and only case, to which we are referred by appellant: "The mere fact that the road was repaired at that place six months after the accident would not in itself be competent evidence tending to show that it was out of repair when the accident happened; but if, in making such repairs, it was found that the ties were in such a state of decay as to fairly lead to the conclusion that they were in a decayed state when the accident hap-

pened, or that the condition of the roadbed was such as would fairly tend to prove that it was not in a safe condition when the accident happened, such evidence would be clearly admissible. Its weight would be a question for the jury." It was, of course, open to the defendant to show that the road had been repaired by putting in new or sound ties before the accident happened.

The objections, and only objections, made to the instructions have been answered by what has been said. The judgment is affirmed.

BARCLAY, J., absent.

The other judges concur.

RAILROADS—FELLOW-SERVANTS—TRACK-REPAIRERS AND TRAINMEN.—A railroad fireman or engineer is a fellow-servant with a section-hand: *Harrison* v. *Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180; *Blake* v. *Maine Cent. R. R. Co.*, 70 Me. 60; 35 Am. Rep. 297. A railway locomotive engineer and a section master of track-repairers are not fellow-servants within the rule as to a master's liability for injury to one servant by another: *Caise* v. *Charlotte etc. R. R. Co.*, 23 S. C. 526; 55 Am. Rep. 28; *Louisville etc. R. R. Co.* v. *Conroy*, 63 Miss. 562; 56 Am. Rep. 835; *St. Louis etc. Ry. Co.* v. *Weaver*, 35 Kan. 412; 57 Am. Rep. 176, and extended note. See, also, the extended note to *Fisk* v. *Central Pac. R. R. Co.*, 1 Am. St. Rep. 32.

RAILROADS.—LIABILITY TO EMPLOYEES FOR INJURIES CAUSED BY UNSAFE CONDITION OF ROADBED: See *Kansas City etc. R. R. Co.* v. *Kier*, 41 Kan. 661; 13 Am. St. Rep. 311, and note; *Taylor etc. Ry. Co.* v. *Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316, and note, with the cases collected; *Krogg* v. *Atlanta etc. R. R.*, 77 Ga. 202; 4 Am. St. Rep. 79, and note, and *O'Donnell* v. *Allegheny Valley R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336, and note.

RAILROADS—DEFECTIVE ROADBED—EVIDENCE.—Evidence of a defect in a railroad track must be confined to the time of the casualty, of which it is alleged to be the cause, or to proof of such a state of facts so shortly before or after it as will induce a reasonable presumption that the condition was unchanged: *Little Rock etc. Ry. Co.* v. *Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245. In an action to recover for injuries received in a railway wreck evidence tending to show the condition of the roadbed immediately before and at the time of the wreck at places other than where the wreck occurred is admissible: *Taylor etc. Ry. Co.* v. *Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316.

JENNINGS v. TODD.

[118 MISSOURI, 298.]

NOTICE—FACTS PUTTING ON INQUIRY.—Generally, one is charged with notice of a fact who has information putting him on inquiry, if by following up such information with diligence and understanding the truth could have been ascertained.

NEGOTIABLE INSTRUMENTS—NOTICE TO HOLDER.—The consideration of negotiable paper in the hands of a *bona fide* holder for value, before maturity, cannot be inquired into. Actual notice of facts impeaching the validity of the note and its consideration must be brought home to him to avoid it in his hands.

CONTRACTS—CONSTRUCTION.—Written instruments made at the same time and relating to the same transaction must be read and construed together.

NEGOTIABLE INSTRUMENTS—COLLATERAL AGREEMENT—NOTICE OF INDORSEE. A collateral, contemporaneous agreement providing that a note shall not be paid if an executory contract forming the consideration for the note shall not be performed is not allowed to defeat the negotiability of the note in the hands of an indorsee, though he has notice of such agreement; but if the breach of such agreement has occurred to the knowledge of the indorsee at the time he becomes a purchaser he is not protected.

NEGOTIABLE INSTRUMENTS—COLLATERAL AGREEMENT—ESTOPPEL.—When a collateral, contemporaneous agreement provides that a note shall not be paid if an executory contract forming the consideration therefor shall not be performed, the fact that the maker states to the indorsee, at the time of the purchase of the note by the latter, that he "supposed he would as soon he would have it as anybody else," does not estop the maker from setting up the validity of the note if at the time of such statement there had been no breach of the executory contract, and he had no reason to suspect that one would occur.

Samuel C. Major and W. C. Todd, for the appellant.

Gordon, Gordon, and Bass, for the respondents.

300 MACFARLANE, J. This is a suit in equity to restrain defendant Todd, as trustee, from selling, under a deed of trust, certain real estate belonging to plaintiffs, and to cancel a note made by them to Potter, Chase & Co., or order, and held by defendant Bush as assignee.

The petition charges, in substance, that on the twenty-third day of October, 1888, plaintiff James I. Jennings entered into a contract, in writing, with Potter, Chase & Co. through C. J. Chase, a member of the firm, by which the said company appointed him agent to control and manage the sale of an illustrated edition of the New Testament, and they agreed to furnish him five hundred books, as they might be called for at Kansas City, at one dollar each, and reciting that he had

given his note for five hundred dollars, or one dollar each on said books. In consideration for the purchase of said books, on said day plaintiffs executed and delivered to said C. J. Chase their negotiable promissory note for five hundred dollars, payable to said Potter, Chase & Co., eighteen months after date, with eight per cent interest from date. To secure which they gave a deed of trust on their said estate, with defendant Todd as trustee; that by the terms of said contract the note was not to be paid, and should be void, if the company did not fulfill every requirement of the contract. The petition charges further that said company did not perform and fulfill 300 the contract in any particular, but wholly refused to supply the books as needed and demanded by plaintiff; that plaintiff was induced to make the contract by false and fraudulent representations, and that defendant Bush purchased said note with full knowledge and notice of the fraudulent means by which it was procured, and of the stipulation in the contract by which the note might become void.

The answer of defendant Bush was: 1. In substance, a general denial; 2. A plea of estoppel; and 3. That he was an innocent purchaser of the note. In the plea of estoppel it was charged that said defendant "purchased said note at the special instance, solicitation, and request of plaintiff, who told him he wished he would trade for it; that if he would he would consider him an innocent purchaser; and that relying upon these representations to him by plaintiff he purchased said note." Said defendant further answered that he was the purchaser of said note before maturity, in good faith, for value, and without notice of any infirmity.

The evidence leaves no doubt that the scheme into which plaintiffs were lead by C. J. Chase was a gross fraud and swindle, which was also worked on others, as was incidentally shown. It is unnecessary to set out the contract in full; it is not at all intelligible, but was doubtless made clear and very beneficial by the representations of Chase. It contained the following clause: "He having settled for one outfit and book, also by note for five hundred dollars, the same being payment of one dollar ($1) each for five hundred books, which he has this day purchased, leaving a balance due of one dollar ($1) on each book, when ordered or delivered, from time to time, n such quantities as the said James I. Jennings may desire." On the back of the contract was the following indorsement: 301

"CENTRALIA, Mo., Oct. 23, 1888.

"The company hereby agrees that the note corresponding to the within contract shall be null and void whenever the company does not fulfill every point of the contract as signed.

[SIGNED] "C. J. CHASE,

"For Potter, Chase & Co."

The contract furnishes sufficient evidence that the books were to be shipped to Jennings from Kansas City whenever ordered, and that they were never furnished, though often ordered by Jennings, was undisputed.

Plaintiffs testified that Chase promised not to assign the note. It appeared, however, from the evidence, that soon after its execution, he indorsed and delivered it to Gahan Brothers as collateral security for a note made by Chase to them, who afterwards themselves indorsed it in blank. Without further indorsement it went into the hands of one or two other parties, and finally to defendant Bush before its maturity, who paid for it near its face value. It appears at this time that neither the fraud nor breach of contract had developed.

It appears further that on the second day of October, 1888, plaintiff executed and delivered to Chase another note payable to the same company eight months after date. This note was also for books under a similar contract, but not containing the indorsement. Defendant Bush also held this note by purchase at the same time.

The only questions of fact or law for our determination on this appeal are whether defendant was a purchaser of the note in good faith and for value, and whether plaintiffs by their acts, conduct, and representations, are estopped to dispute its validity. The questions of fact, on both propositions, were found by the circuit court against the defendant. The evidence of plaintiff and defendant Bush were in direct and 302 irreconcilable conflict. Each was corroborated by direct evidence of witnesses and by circumstances. Plaintiff testified in the most positive terms that he read the contract and indorsement to defendant before he purchased the note, and Roberts testified that he was present and heard them read, and there were other corroborating circumstances. On the other hand, defendant testified that he had no recollection of plaintiff reading either the contract or indorsement, and the fact that he paid near the face value for the

note is a circumstance tending to corroborate his evidence on that question.

On the question of estoppel, defendant Bush testified that he purchased the notes on December 8, 1888. Before he bought them he went to Mr. Jennings and told him that the notes had been offered him. "When I asked him should I trade for the note, he said 'Yes; I wish you would.' He said, 'Then they will be right here, and as soon as my family is able I will make the money and pay them off. I will be glad if you will purchase them; it will not be like that other circumstance. I will consider you an innocent purchaser.' I bought them on his representation. I had no knowledge of the existence of any such paper as Mr. Jennings had." William Walker testified that he afterwards heard Jennings say that he considered defendant an innocent purchaser. On this question plaintiff himself testified: "Mr. Bush talked to me about the purchase of the notes. I told him if anybody was to get them I would as soon have him purchase them as anybody."

The evidence shows that defendant Bush purchased the note and it was delivered to him on the fifteenth day of December, 1888, and the contract and indorsement were read to him on the 13th of that month, and it was prior to this date that defendant had asked plaintiff about buying the note. At the time of these [sic] transactions plaintiff had made no order for books under this contract.

The following facts may be taken as established by the evidence: 1. Defendant Bush purchased the note for value before maturity; 2. That he was aware of the terms of the contract and the indorsement when he purchased; 3. That plaintiff encouraged defendant to purchase the note.

The court found for plaintiff, and granted the relief sought; and defendant appealed.

1. That defendant Bush purchased the note for value before maturity is not questioned, either under the pleadings or evidence. The good faith of the transaction is the only subject of inquiry on this branch of the case. Defendant insists that, though the contract may have been fraudulent in its inception, and he may have been aware of the questionable methods under which Chase conducted his business, and of the suspicious circumstances under which the contract in question was obtained, and that he also had knowledge of the contemporaneous written agreement, yet, neither

one nor all of these facts together relieved the note of its negotiability; that nothing short of actual knowledge of the fraud or that there had been a breach of the contract before the note came into his hands could defeat his right to enforce his security against the land.

In general one will be charged with notice of a fact who has information which should put him upon inquiry, if, by following up such information, with diligence and understanding, the truth could have been ascertained. It is now well settled in this state, however, that the doctrine of notice, as it affects the good faith of transactions generally, does not apply to negotiable commercial paper. "Both upon principle and authority," says Wagner, J., "and from the experience of jurists and commercial men, and the interests [sic] of the affairs of business life, it is safe to say that the liberal doctrine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holder's rights": *Hamilton* v. *Marks*, 63 Mo. 178. Since the decision in that case it has been settled law in this state "that the consideration of negotiable paper in the hands of a *bona fide* holder for value before maturity cannot be inquired into. *Mala fides* alone can open the door to such inquiry. Gross negligence, even, is not sufficient; actual notice of the facts which impeach the validity of the note must be brought home to the holder": *Mayes* v. *Robinson*, 93 Mo. 122.

2. The next inquiry is, were the rights of defendant as indorsee of the note affected by knowledge of the transaction which was the consideration of the note and of the indorsement on the back of the contract. The contract, indorsement, and note have the same date, and, as the evidence shows, were made at the same time. According to the general rule of construction, in general business matters, these being all made at the same time and relating to the same transaction should be read and construed together; but should that rule be applied when one of the instruments is a negotiable security? It is said that the rule may be applied to the construction of a contemporaneous written contract affecting the terms of negotiable paper, "in so far as each may be given effect, and there is no repugnancy between them": 1 Daniel on Negotiable Instruments, 4th ed., sec. 156. The rule is frequently applied to collateral agreements for renewals, for the payment of an additional sum upon a

contingency for the same consideration, and fixing a time for payment of note or interest: 1 Daniel on Negotiable Instruments, 4th ed., sec. 156. An indorsee with notice will be [305] bound by such agreements. They are not repugnant to the negotiable character of the note.

We think, however, that no well-considered case can be found in which a collateral contemporaneous agreement providing that the note should not be paid in the event that an executory contract, which was the consideration of the notes should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee, though he had notice of such agreement. A great part of the improvement of the country, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts, and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects *bona fide*, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed and such business would be paralyzed. By making and delivering a negotiable note the maker is held to intend that it may be put in circulation and that no defenses against it exist. In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity.

On this subject Parsons, in his work on Notes and Bills (vol. 1, p. 261), says: "Knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact": See, also, *Miller* v. *Ottaway*, 81 Mich. 196; 21 Am. St. Rep. 513; *Adams* v. *Smith*, 35 Me. 324; *Kelso* v. *Frye*, 4 Bibb, 493; *Dow* v. *Tuttle*, 4 Mass. 414; 3 Am. Dec. 226; *Davis* v. *McCready*, 17 N. Y. 230; 72 Am. Dec. 461. Tiedeman on Commercial Paper, sec. 42, and cases cited.

[306] If the breach had occurred to the knowledge of the indorsee when he purchased he would not, of course, be protected. The settled rules of law governing commercial paper, upon the stability of which alone can the usual business of the country be transacted, cannot be disregarded in order to relieve a few unwary persons from the result of transactions into which they have been drawn by their own credu-

lity or cupidity. Upon careful consideration, we think the contract afforded no defense to the note which was purchased before a breach occurred.

3. The next question is, whether plaintiff is estopped by his statements and conduct to dispute the validity of the note in the hands of defendant. If, at the time the representations were made, there had already been a breach of the contract, or other defenses existed, it would have been the duty of plaintiff to have spoken, and, not having done so then, he should not thereafter be allowed to deny the truth of his representations. But at the time the representations were made there had been no breach of the contract, and plaintiff, so far as appears, had no reason to suspect that one would occur. The representations can be taken, then, as referring to the existing *status* of the note and to defenses then known, and did not exclude such as might subsequently arise. 1 Daniel on Negotiable Instruments, 4th ed., sec. 860, and the following cases cited, which fully sustain the text: *Maury* v. *Coleman*, 24 Ala. 382; 60 Am. Dec. 478; *Cloud* v. *Whiting*, 38 Ala. 57; *Allen* v. *Frazee*, 85 Ind. 283; *Koons* v. *Davis*, 84 Ind. 389.

If plaintiff had made an absolute promise to pay the note he might have precluded himself from making defenses subsequently arising. Defendant's own testimony did go so far as to claim an absolute promise. He states that, when he told plaintiff he was [307] about buying the notes, he replied: "I wish you would trade for them; then they will be right here, and as soon as my family gets able I will try to make the money and pay them off. I will consider you an innocent purchaser, and wish you would get them." Plaintiff testified: "I told him that Mr. Chase had promised to keep the notes himself, but as he had traded them off already, I suppose I would as soon he would have them as anybody else." We think the probability is that the statement of plaintiff is nearest correct, and that there was no absolute promise to pay the note.

4. The controlling question is, whether the defendant had notice of the fraudulent intent of Chase, or participated in accomplishing it. The fraudulent scheme of Chase was well developed by the evidence. His efforts were directed to inducing parties to enter into an agreement to manage the sale of a book in certain localities, and by pointing out the profits they could realize by purchasing a lot of books, the sale of

which they could control themselves, to obtain from them negotiable notes payable in the future. He remained in the neighborhood, furnishing to the parties taking hold of the scheme books as they were sold, until he had obtained all the notes he could procure. He then sold the notes, left the neighborhood, and refused to furnish books to those who had purchased. He boarded at a hotel in Centralia. Defendant Bush frequently visited him at his hotel. This he admitted. Said he went because he "liked to hear him go over his prospectus." Defendant introduced Chase to plaintiff. He hunted him up for that purpose. On the introduction he went to the hotel and was present during a part of the interview between them. For this introduction Chase paid him fifty dollars. He told a friend, who upbraided him with getting plaintiff into trouble, that he had a "right to work for a commission [308] as much so as anybody else had in any other kind of business." Defendant testified that he told plaintiff that if he did not get the books he would not be hurt, for it was written in the contract that in that event the note would be null and void. "He asked me if it was written on the note, and I told him that it was not; he said if that was written on the note then Mr. Chase could not trade it off." It will be observed that the fraud of Chase was not in the character of the contracts made, but in a predetermined intention, after obtaining and selling the notes, not to comply with the contract. This fact should be kept in mind in considering the good faith of Bush in the matter.

It is insisted that the evidence establishing the foregoing facts fixes upon defendant Bush the knowledge of the fraudulent intent of Chase, and we would be of that opinion if it disclosed all the facts and circumstances in the case. The fact that Chase paid Bush fifty dollars for an introduction to Jennings, standing alone, ought to be in itself conclusive of knowledge of, if not participation in, the intended fraud. But that fact does not stand alone. It seems from the evidence to have been well understood, in fact no secret was made of it in the neighborhood, that any person would be paid by Chase a like commission for introducing one who would enter into a contract such as plaintiff made. Jennings admitted that he was informed, before he entered into the contract, that Bush was so paid for introducing him. He himself afterwards obtained a reward for introducing a Mr. Green to Chase, and admitted that he had also tried to induce

others to make contracts. If we charge defendant with notice of the fraud we must also charge plaintiff with knowledge. He disclaims such knowledge. Why then should we charge knowledge upon defendant? He paid nearly the face value for the note, which is a strong [309] circumstance in his favor. We should attribute to each party honesty of purpose in the absence of proof to the contrary. It is evident, we think, from all the circumstances, that both parties honestly believed, when the transfer of the note was made, that the contract would be fully performed. We think from the evidence before us that the defendant at most had a mere suspicion that the contract would not be carried out. This, as has been seen, was not sufficient to stamp his purchase with bad faith.

The question of right between these parties is undoubtedly a close one. The case was evidently tried by plaintiff on the theory that notice of the contract and the indorsement thereon was sufficient to charge defendant with bad faith in buying the note. Upon a trial of fact by a chancellor, when the evidence is so nearly balanced, we are not disposed to disturb the result reached; but in this case, in which no specific findings were asked by counsel or made by the court, we cannot determine whether the finding was upon the question of notice, or was controlled by some of the legal propositions herein discussed. With the view we take of the law we are not satisfied with the finding. We therefore reverse the judgment and remand the cause for a retrial, if the parties desire it.

All concurred, except BARCLAY, J., who was absent.

NOTICE.—FACTS PUTTING ON INQUIRY: See *Mercantile Nat. Bank* v. *Parsons*, 54 Minn. 56; *ante*, p. 299, and note; and *Kitchen* v. *Loudenback*, 48 Ohio St. 177; 29 Am. St. Rep. 540.

CONTRACTS—WRITINGS CONSTRUED TOGETHER AS ONE INSTRUMENT.—Two or more writings executed at the same time, relating to the same transaction, will be construed together as parts of one and the same instrument: *Chambers* v. *Marks*, 93 Ala. 412; *Edling* v. *Bradford*, 30 Neb. 593; *Kiser* v. *Dannenberg*, 88 Ga. 541; *McGeragle* v. *Broemel*, 53 N. J. L. 59; *Schmueckle* v. *Waters*, 125 Ind. 265; *Smith* v. *Theobald*, 86 Ky. 141; *Sutton* v. *Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344, and note; *McNamara* v. *Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; *Weber* v. *Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; *Brackett* v. *Edgerton*, 14 Minn. 174; 100 Am. Dec. 211; *Howell* v. *Howell*, 7 Ired. L. 491; 47 Am. Dec. 335, and note. See, also, the notes to the *Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 894; *Blossom* v. *Griffin*, 67 Am. Dec. 80, and *Adair* v. *Adair*, 71 Am. Dec. 785.

NEGOTIABLE INSTRUMENTS — CONSIDERATION — INQUIRY CONCERNING IN HANDS OF BONA FIDE HOLDER.—The consideration for a negotiable instrument cannot be inquired into in the hands of a *bona fide* holder: *Laflin etc. Powder Co.* v. *Sinsheimer*, 48 Md. 411; 30 Am. Rep. 472; *Beltzhoover* v. *Blackstock*, 3 Watts, 20; 27 Am. Dec. 330, and note. Want of consideration is no defense to a note in the hands of a *bona fide* indorsee before maturity: *Hascall* v. *Whitmore*, 19 Me. 102; 36 Am. Dec. 738. The consideration for a negotiable instrument can be impeached in the hands of a *bona fide* indorsee only by showing that the note was indorsed after it became due, or that the indorsee had notice of want of consideration at the time he took it, or there was fraud in obtaining the making of the note: *Mulford* v. *Shepard*, 1 Scam. 583; 33 Am. Dec. 432. A *bona fide* purchaser of negotiable paper before maturity, without notice of defects in it, is entitled to recover the amount of the paper in full, and is not restricted to the amount he paid for it: *Williams* v. *Huntington*, 68 Md. 590; 6 Am. St. Rep. 477, and note. See, also, the notes to *Rice* v. *Jones*, 14 Am. St. Rep. 809; and *Knight* v. *Pugh*, 39 Am. Dec. 102.

NEGOTIABLE INSTRUMENT — EFFECT OF COLLATERAL AGREEMENTS. — A mere collateral agreement, made at the time a note is given, does not affect its negotiability, although the purchaser, before maturity, may know of such agreement: *Miller* v. *Ottaway*, 81 Mich. 196; 21 Am. St. Rep. 513; *Parker* v. *Sutton*, 103 N. C. 191; 14 Am. St. Rep. 795. A parol condition to a promissory note will not affect innocent holders: *Smith* v. *Moberly*, 10 B. Mon. 266; 52 Am. Dec. 543, and note; *Rice* v. *Ragland*, 10 Humph. 545; 53 Am. Dec. 737.

IN RE COPENHAVER.

[118 MISSOURI, 377.]

HABEAS CORPUS CANNOT BE USED AS A WRIT OF ERROR to review proceedings under which a party is imprisoned for contempt of court.

JURISDICTION—CONFLICT BETWEEN FEDERAL AND STATE COURTS.—State courts and the judges thereof have no jurisdiction or power under *habeas corpus*, or otherwise, to discharge persons who are held in custody by authority of the federal courts, or by authority of commissioners thereof, or by officers of the United States acting under the laws thereof, although the judgments or orders of the federal courts or commissioners are illegal. The remedy in such cases is only in the United States courts.

Wallace W. Lawton, prosecuting attorney, for the petitioners.

John B. Henderson and John H. Overall, for the respondent.

381 BLACK, C. J. The three petitioners are the justices of the county court of St. Clair county. They file in this court their petition for a writ of *habeas corpus*, setting out fully and at length the facts and circumstances leading to their confinement, which are to the following effect:

In 1870 the county of St. Clair issued two hundred and fifty thousand dollars of bonds, under the act of the 16th of

January, 1860, incorporating the Tebo and Neosho Railroad Company, and the act of the 21st of March, 1868, to aid in the construction of the Clinton and Memphis branch. The Ninth National Bank of the city and state of New York recovered two judgments against the county on some of the bonds and coupons in the circuit court of the United States. Such proceedings were had on these judgments that the circuit court of the United States for the western division of the western district of this state issued a peremptory writ of *mandamus* in each case, commanding the petitioners, as justices of 283 the county court, "to levy, at the time of making the next annual levy, and cause to be collected, upon all the real and personal property in said county, subject to taxation, a tax for the payment of said judgment, and to pay the same according to law, and that you have said special taxes extended in a column of the regular tax book in the same manner," etc.

The writs were issued on the 25th of April, and duly served on the 1st on May, 1893. Such other proceedings were had that on the 10th of May, 1893, the court entered the following judgment in each case: That the respondents, the petitions here, "are guilty of contempt in disobeying, as well as continuing to disobey, the said peremptory writ of *mandamus* and the order and command therein, and for such contempt each of said respondents is here and now sentenced by this court to imprisonment in the county jail in the county of Jackson until such a time as they shall comply with such mandate and order of this court, or until otherwise discharged therefrom by the order of this court, or otherwise pursuant to law."

Pursuant to these judgments, commitments were issued, by virtue of which the petitioners were, and now are, confined in the jail of Jackson county, and from which imprisonment they seek to be discharged by the writ of *habeas corpus*.

We have not set out the various averments made in the petition for the purpose of showing that the bonds were issued without authority of law, and should have been held illegal and void, because the question as to the validity of the bonds is not an open one. The circuit court of the United States had undoubted jurisdiction of the parties to, and the subject matter of, those suits, and the judgments are final and conclusive. We have no right or power to go behind the judgments; and, for all the purposes of this application, it

must be [283] assumed that the bonds were, and are, valid obligations of the county.

Counsel for the petitioners insists in an elaborate brief, and earnestly insisted on the argument of this cause, that the petitioners are illegally imprisoned for various reasons. Some of the reasons assigned show, and only show, that the circuit court of the United States committed error in awarding the peremptory writs of *mandamus*. Such reasons would not justify any court in releasing the petitioners on *habeas corpus;* for that writ cannot be used as a mere writ of error. This is well-settled law. Other of the reasons assigned for the discharge of the petitioners strike much deeper. Thus, it is insisted that the commitments are utterly void, because they are based upon a refusal to obey peremptory writs of *mandamus*, which writs of *mandamus* are void, because they command the petitioners to cause the taxes to be collected, when the petitioners, as justices of the county court, have nothing whatever to do with the collection of taxes, that duty being devolved upon the collector, who is a bonded officer, acting under the law and not under the orders of the county court. And in support of these propositions counsel cite *Ex parte Rowland*, 104 U. S. 604.

These and other propositions will be entitled to a full consideration at the hands of this court, if we have the power to go into them. But behind all of them is the question whether this court has any jurisdiction whatever to discharge the petitioners, they having been committed to jail for contempt by the judgment of a federal court; and this presents the first question for our consideration.

The facts in the cases of *Ableman* v. *Booth* and *United States* v. *Booth*, 21 How. 506, are, in short, to the following effect: In one case Booth had been arrested on warrants issued by a United States commissioner. [284] A judge of the supreme court of Wisconsin discharged Booth on *habeas corpus*, on the ground that the law was unconstitutional, for a violation of which the arrest had been made. In the other case Booth was subsequently arrested and convicted in a federal court for the same offense, and the state court again discharged him on *habeas corpus*. Both cases were taken to the supreme court of the United States for review. The court said: "There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they

must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the union, for an offense against the laws of the state in which he was imprisoned." And further on it is again said: "We do not question the authority of a state court or judge who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further."

385 The principles asserted in these cases were affirmed in *Tarble's case*, 13 Wall. 397. There the specific question was whether a state court commissioner had jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of a soldier into the military service of the United States. The court stated the question to be decided in much broader terms, that is to say: "Whether any judicial officer of a state has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government." It was held that state judicial officers have no such jurisdiction, and hence the state court commissioner was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner, he being held under claim and color of the authority of the United States.

In answer to the claim made in the case now in hand that the commitments are void, because the writs of *mandamus* command the petitioners to do that which they have no power to do, namely, cause the taxes levied by them to be collected, we make the following quotation from the case last mentioned:

"Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman* v. *Booth* and *United States* v. *Booth*, 21 How. 506, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation." A state court or judge, it is held, should not proceed if the prisoner is held under what purports to be the authority of the United States, that is to say, "an [386] authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts, or officers alone to grant his release."

In *Robb* v. *Connolly*, 111 U. S. 624, it was held that an agent appointed by a state in which a fugitive stands charged with a crime, to receive the fugitive from the state surrendering him, is not an officer of the United States within the meaning of the cases before cited; and it was further ruled in that case that, while the federal courts have the exclusive authority to determine whether persons are held in conformity with law, who are held in custody by authority of the national courts or the commissioners thereof, or by officers of the United States, yet the states have the right, by their courts and judges, in all other cases, to inquire into the grounds upon which any person is restrained of his liberty, and to discharge him if illegally restrained; and this, too, although such illegality may arise from a violation of the constitution and laws of the United States.

From the foregoing authorities it must be taken as now well-established law that state courts and the judges thereof have no jurisdiction or power to discharge persons who are held in custody by authority of the federal courts, or by the authority of the commissioners of such courts, or by officers of the United States acting under the laws thereof; and this is true though the judgments or orders of the federal courts or commissioners are illegal. The remedy in all such cases is in the courts of the United States. Adherence to these rules is absolutely necessary to prevent conflict of jurisdiction and to maintain and uphold the stability of both the national and state governments. On the other hand, state governments and the judges thereof [387] have all the exclusive ju-

risdiction of independent governments, except so far as the states have granted judicial powers to the general government. Out of this exception arises the doctrine that the federal courts and judges may, by *habeas corpus*, release persons restrained of their liberty in violation of the constitution and laws of the United States, though such persons are restrained under the criminal process of the state. This inequality is due to the fact that the constitution and laws of the United States are the supreme law of the land.

It appears on the face of the petition in this case that the petitioners are imprisoned by virtue of the orders or judgments of a court of the United States; and it follows from what has been said that this court has no power, on the conceded facts to discharge them, and this is true though this court should be of the opinion that the judgments of the circuit court of the United States are in excess of its rightful powers. It is therefore out of place here to go into the question whether the orders of commitment are in any respect in excess of the jurisdiction of that court. That is a question which must be determined by the national courts themselves.

As to the objection that the commitments place no limit upon the duration of the imprisonment, save a compliance with the writs of *mandamus*, it may be observed, in addition to what has been said, that those courts in matters of contempt, proceed according to section 725 of the Revised Statutes of the United States, and not according to the statute law of this state. The writ is therefore denied.

BARCLAY, J., absent.

The other judges concur.

HABEAS CORPUS—REVIEW OF CONTEMPT PROCEEDINGS ON.—Inquiry on *habeas corpus* into the commitment of the prisoner for contempt is confined to the determination whether or not the court had jurisdiction. No irregularity, and no question of wrong or injustice done to the petitioner, can be considered: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263. See the notes to *Ex parte Sternes*, 11 Am. St. Rep. 256, and *Ex parte Grace*, 79 Am. Dec. 536.

JURISDICTION—CONFLICT BETWEEN STATE AND FEDERAL—HABEAS CORPUS.—A state court may on *habeas corpus* inquire into the validity of any detention of liberty which it is attempted to justify under pretense of authority derived from the United States: *State* v. *Dimick*, 12 N. H. 194; 37 Am. Dec. 197, and extended note; *In re Tarble*, 25 Wis. 390; 3 Am. Rep. 85.

STATE *v.* STONE.

[113 MISSOURI, 338.]

INSURANCE—STATUTES REGULATING CONSTRUCTION.—A statute providing that "no company" shall transact an insurance business within the state without having received proper license to do so from the state insurance superintendent, includes individuals or associations of individuals, as well as incorporated companies.

INSURANCE—RIGHT OF STATE TO REGULATE.—A statute prohibiting one from acting as agent or solicitor for any individual, association of individuals, or corporation in the transaction of insurance business within the state, unless such agent has obtained from the state superintendent of insurance a certificate authorizing him to so act, or before such individual, association of individuals, or corporation shall have been duly authorized and licensed by such superintendent to transact insurance business in the state, and providing that a violation of the terms of such statute shall constitute a misdemeanor, is a valid exercise of the right of a state to regulate insurance business within its limits.

INSURANCE—RIGHT OF STATE TO REGULATE.—A state has the right to prescribe reasonable conditions upon which insurance business may be carried on within its limits by individuals as well as by corporations, provided it does not discriminate between citizens of equal standing and merit within or without the state.

M. W. Huff, Lee, McKeighan, Ellis and Priest, for the appellant.

R. F. Walker, attorney general, for the state.

303 BURGESS, J. This is a suit begun upon an information based upon an affidavit made on April 25, 1893, by C. P. Ellerbe, the then superintendent of the insurance department of the state of Missouri, in which information the defendant is charged with the violation of the second clause of section 5916 of the Revised Statutes of 1889, by representing, as agent, certain individuals, and writing for them a policy of insurance, by the terms of which they agreed to indemnify one Emmitt Thoroughman against accident before said individuals had procured a license to do business in Missouri.

The defendant was arrested upon a warrant, was 304 arraigned, and pleaded not guilty, and upon the hearing of the evidence was fined ten dollars and costs. After a motion for a new trial was overruled, and also a motion in arrest, defendant brings the case here by appeal.

The evidence showed that the parties whom defendant represented in procuring this insurance were one hundred in number, residing in the state of New York, who were conducting insurance upon the manner of the ancient Lloyds; that

they individually signed a power of attorney authorizing certain parties to write insurance for them individually, and that each policy written was, in case of loss, to be a charge against them individually, and not jointly, in a sum equal to one one-hundredth of the amount of the liability incurred.

By the terms of the agreement each individual agrees to deposit with an advisory committee the sum of one thousand dollars, which is to be held for the individual account of such subscriber, and which is to be credited or debited in case of gain or loss as an individual account. The "insurance to be effected for and on behalf of each of the individual subscribers hereto" shall be in charge of certain parties "as attorneys in fact of each subscriber hereto." "The attorneys shall keep separate accounts for each of the subscribers to this agreement, and each subscriber shall at all times have access to his individual account"; an advisory committee is provided for, who shall cause to be made up, on the 31st of December, in each year, all the accounts of the several subscribers hereto. The several subscribers, in case the year's business was profitable, are then to receive such part of the profits credited to their individual accounts as the advisory committee shall determine, and are to receive a certificate for the balance. In case the accounts show that there has been a loss, then each subscriber is to make his individual account good.

Any subscriber may withdraw by giving thirty days' notice, and the advisory committee may, if it is deemed advisable, compel the attorneys to cease acting for any particular individual. In certain conditions a member may assign his individual holding and liability to any other individual, if approved by the advisory committee.

"Neither of the subscribers shall be made jointly liable with the others, or with either of the others, but each subscriber shall only be made severally and separately liable to the amount authorized by him individually in the power of attorney given by him to the attorneys above mentioned; nor shall any joint liability be created on behalf of the subscribers hereto, in any manner arising out of the business to be carried on under this agreement, but only a several liability on behalf of each individual subscriber. No policy, however, shall be issued on behalf of any individual subscriber hereto, unless each of the individual subscribers insures for a like amount on said policy."

There is no limit upon the liability of the several members. His whole property is liable for the payment of any liability incurred by him.

The contract also provides that each one of the insurers, in consideration of the premises and of the execution of this agreement by the others, does hereby severally agree for himself individually to and with the others, and with each of them, that he and his representatives and assigns will faithfully abide by and carry out his obligations and covenants hereunder.

The policy written provides that "each of the subscribers hereto, as a separate underwriter, does for himself, and not one for the other, hereby insure (subject to the conditions herein) E. B. Thoroughman," etc. It further provides that in case of suit brought for loss under the policy it is to be begun against only one of the underwriters at one time, a final decision to be decisive of such claim against each of the underwriters. Each of the present subscribers, as a separate underwriter, binds himself severally and not jointly with any other for the true performance of the premises for the amount expressed to be insured by him.

Section 5916 of the Revised Statutes of 1889, under which defendant was prosecuted and convicted, reads as follows: "Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals, or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance department of this state the certificate authorizing him to act as such agent or solicitor, as required by section 5910 of the Revised Statutes of this state, or who shall act as agent or solicitor for any individual, association of individuals, or corporation engaged in insurance business before such individual, association of individuals, or corporation shall have been duly authorized and licensed by the superintendent of the insurance department of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten dollars nor more than one hundred dollars for each offense, or imprisonment in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

The specific charge against defendant is that he did willfully and unlawfully act as agent and solicitor for certain individuals (whose names are set out) in inducing and procuring one Emmitt Thoroughman to enter into a contract of accident insurance with said individuals before said individuals were duly authorized or [397] licensed to do business of insurance.

It is conceded by counsel for defendant that he was an insurance agent, and that he was acting as such at the time charged in the information, as that term is used and defined by section 5916 of the Revised Statutes of 1889.

It may be conceded, as is contended by counsel for defendant, that the office of insurance superintendent is one created by statute, and that he can only grant a license to such persons as the statute designates, and license issued by him to any other would be null and void: *People* v. *Davis*, 45 Barb. 494; *Amerman* v. *Hill*, 52 N. J. L. 326; *McGee* v. *Beall*, 63 Miss. 455. And that, as a general thing, "associations of individuals," as used in our statute, is synonymous with corporations, or applies to joint-stock companies having a capital stock divided into shares, and governed by articles of association which prescribe their objects, and in which the members assume the liability of partners to the creditors of the company, and is also well-settled law: Cook on Stocks and Stockholders, sec. 504. But the word "company" sometimes includes individuals as well as corporations (*Chicago Dock & Canal Co.* v. *Garrity*, 115 Ill. 155), depending on the sense in which it is used, and the intent of the lawmaking power.

The use of the word "company" in section 5910 of the Revised Statutes of 1889, which provides that no company shall transact in this state any insurance business, unless it shall first procure from the superintendent of insurance department of this state a certificate stating that the requirements of the insurance laws of the state have been complied with, authorizing it to do business, we have no doubt was simply because the business of insurance in this state is almost all done by incorporated companies. It should be read in connection with the following section, and as including both [398] companies and association of individuals. The letter of the section must yield to the evident intent of the legislature as deduced from the whole act in regard to insurance taken together, giving due consideration to the object of

the act and the fact that it is intended to regulate the entire system of insurance within the state: *Perry Co.* v. *Jefferson Co.*, 94 Ill. 214; *St. Louis etc. R. R. Co.* v. *Trustees etc.*, 43 Ill. 303.

Section 5793 of the Revised Statutes of 1889 provides that the insurance department shall be charged with the execution of all laws now in force, or which may be hereafter enacted, in relation to insurance and insurance companies doing business in this state. Section 5801 provides that it shall be the duty of the superintendent of the insurance department "to file in his office and safely keep all books and papers required by law to be filed therein, to issue certificates of authority to transact business in this state to any companies who have fully complied with the laws of this state in the organization of insurance companies, and the transaction of the business of insurance, etc. Section 5802 makes it his duty to furnish to every insurance company doing business in this state blanks on which to make its annual report; while section 5805 provides for an examination by the commissioner of any insurance company incorporated or doing business in this state, and section 5807 provides for the payment of certain fees to be paid by such insurance companies.

The whole of article 2 of the Revised Statutes of 1889, in regard to life and accident insurance, uses the words "company" or "corporation," and in no place does it make use of the word "individual," and, if taken by itself, it must be conceded that the various provisions therein contained relate to incorporated companies doing an insurance business in this state, and not to individuals or an unincorporated association of individuals. The [399] first section of article 5, of the same chapter, being section 5910 of the Revised Statutes of 1889, is an old section brought down from the Revised Statutes of 1879; and, standing alone, it also relates to, and contemplates, incorporated companies, and not individuals or an unincorporated association of individuals. But the next section, as amended and carried into the Revised Statutes of 1889, provides that "No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri, unless he or they shall first fully comply with all the provisions of the law of this state governing the law of insurance."

This section in express terms makes the provisions of article 2 applicable to an individual, or an association of individuals, doing an insurance business. The argument that section 5916, upon which this information is founded, should be disregarded, so far as it applies to a person or an unincorporated association of persons, because the law points out no method by which a person or such an association can procure a certificate to do business, is not well taken. The argument is based upon a false assumption; for, according to section 5911, an individual or such an association of individuals may, and indeed must, first comply with the laws governing the business of insurance, meaning, in case of life and accident insurance, the provisions of article 2. It is true that some of the provisions of that article can have no application to an individual doing insurance business, as, for instance, those relating to the organization of insurance corporations; and in other instances designated officers of the insurance corporation are required to do certain things. All these things can be done by the individual or the association of individuals proposing to do an insurance business. There is no difficulty whatever in this respect, and the individual 400 or association proposing to do an insurance business can make the required deposits and do the other things necessary to procure a certificate to do such business.

The evident intent of the legislature, as shown by the sections of the statute quoted, was to regulate and systematize the business of insurance in this state, and that it was never its purpose to require strict observance of its statutory behests, by corporations and companies, doing business in this state, and to require nothing whatever of individuals engaged in the same business. On the contrary, it is manifest that the intent was to require of them the same compliance with the law that is required of corporations and companies, and if we are correct in this position, while conceding that the offense with which the defendant is charged is penal in its nature, and that in such case a strict construction of the statute is required as is held in *Commonwealth* v. *Carrol*, 8 Mass. 490; *State* v. *Brady*, 9 Humph. 74; *Hamuel* v. *State*, 5 Mo. 260, and Bishop on Statutory Crimes, section 220; yet it is not proper or reasonable to construe it strictly for the mere purpose of defeating it when the intent is plain as in this case.

Whether the state has a right to say to an individual, or a company of individuals, other than a corporation, that they

or it cannot engage in two or more kinds of business, is unnecessary to pass upon in this case, as there is no such question involved in this controversy, nor is the right of the citizen abridged by requiring of him the same duties, and the compliance with the provisions of the statute, that are required of a company, composed as they are of individuals, engaged in the same business.

If, then, we are correct in our position in construing the statute as including and meaning individuals there is no apparent reason why defendant could not have obtained from, and why the insurance commissioner [401] could not have issued to, him a valid certificate under sections 5910 and 5911 of the statute, if defendant had shown to him that those whom he represents had complied with the law in regard to insurance companies doing business in this state.

A further contention on the part of defendant is, that the state has no right to regulate the business of insurance as conducted by individuals. That the state may impose conditions on corporations doing business in this state that it cannot impose on an individual is well settled, because they are creatures of the law, and have no power or authority to transact any kind of business save and except that authorized by their charters and the statutes under which they are organized: Boone's Law of Corporations, sec. 33; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *American Union Exp. Co.* v. *St. Joseph*, 66 Mo. 675; 27 Am. Rep. 382; Tiedeman's Limitations of Police Power, 281. But while this is true, it is also true that the state has, by virtue of its sovereign power, the right to regulate all trades, callings, and professions; but it cannot discriminate between citizens of equal standing and merit. There is no pretense that there is any discrimination in the case at bar between citizens of this or any other state. That the state also has the power to require corporations, companies, and individuals, who propose to engage in the insurance business, to make deposit with the insurance commissioner of a reasonable amount of money or securities to secure their policy-holders against loss seems but reasonable and just. We do not contend that it would have the right to exact a deposit of exorbitant or an unreasonable amount, the effect of which would be to prevent individuals, as well as companies, from engaging in such business. But the statute in this regard we think not unreasonable, and could have no such an effect.

402 As has been said, section 5911 expressly includes individuals, and subjects them to the same provisions as companies and corporations.

Section 5916, under which defendant was convicted, prohibits any one from acting as agent or solicitor for any individual, association of individuals, or corporation in the transaction of insurance business, without such person or persons having first obtained from the superintendent of the insurance department a certificate authorizing him to act as such agent or solicitor, or before such individual, association of individuals, or corporation shall have been duly authorized and licensed by the superintendent of the insurance department to transact business in this state. A violation of this section by the agent or solicitor subjects the offender, upon conviction, to a fine, imprisonment in the county jail, or both.

In a recent opinion delivered by the supreme court of Kansas (*State* v. *Phipps*, 50 Kan. 609; 34 Am. St. Rep. 152), the court says: "At this writing, it is probable that every state in the union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. The state has power to regulate and control, and to provide penalties for the transgression of its regulating and controlling statutes. If the theory of the counsel for the appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone."

In *Paul* v. *Virginia*, 8 Wall. 168, the statute of Virginia required that every insurance company not incorporated by that state should, as a condition of carrying on its business there, deposit securities with the state treasurer and obtain a license; and another statute made it a criminal offense for a person to act in Virginia 403 as agent for an insurance company not incorporated by Virginia without such license. Paul, the defendant, acted as agent without a license, and was convicted and fined. The case, therefore, arose out of an attempt on the part of Virginia to enforce its penal laws for the regulation of the business of insurance within its borders. The court held that such a statute violated no provision of the constitution of the United States, and affirmed the judgment of conviction. To a like effect are *Ducat* v. *Chicago*, 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566.

To allow the defendant to carry on the business of an insurance agent under the circumstances as developed in this case, without complying with the law in regard to insurance, would be simply licensing him and those whom he represents to evade the law, while companies and corporations engaged in the same business have complied therewith. If he and those whom he represents desire to engage in such business, they should comply with the law, and, while deriving benefits from such business, bear the burdens imposed upon it by statute.

The judgment is affirmed.

All concurred, except BARCLAY, J., absent.

INSURANCE—STATE REGULATION OF FOREIGN COMPANIES.—The state has power to regulate and control the business of a foreign insurance company within its boundaries, and to provide penalties for the transgression of the regulating and controlling statutes by means of which that power is exercised: *State* v. *Phipps*, 50 Kan. 609; 34 Am. St. Rep. 152, and note, with the cases collected; *Firemen's Ben. Assn.* v. *Loundsbury*, 21 Ill. 511; 74 Am. Dec. 115. See, also, the notes to *State* v. *Goodwill*, 25 Am. St. Rep. 874, and *People* v. *Fire Assn.*, 44 Am. Rep. 391. A foreign insurance company cannot, without first complying with the laws of Illinois enacted for their regulation, make contracts which it may enforce: *Cincinnati etc. Assur. Co.* v. *Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626. A statute requiring the agent of insurers doing business in New York city, but not incorporated under New York laws, to pay a percentage upon the gross premiums received by them for insurance upon property in that city to the Exempt Firemen's Benevolent Fund is not unconstitutional: *Trustees* v. *Roome*, 93 N. Y. 313; 45 Am. Rep. 217. It is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority from the state: *Pierce* v. *People*, 106 Ill. 11; 46 Am. Rep. 683.

BANK OF ATCHISON COUNTY *v.* DURFEE.

[118 MISSOURI, 431.]

CORPORATIONS—LIEN ON STOCK—INNOCENT PURCHASER.—A by-law of a banking corporation providing that no transfer of stock shall be allowed so long as the holder is indebted to the bank, and that the bank shall reserve a lien on all stock for such indebtedness, is void as against an innocent holder or purchaser for value unless expressly authorized by statute.

CORPORATIONS—RESTRICTIONS ON ALIENATION OF STOCK.—Alienation is an incident to corporation stock, and a by-law prohibiting this right or imposing any restrictions on its exercise is in restraint of trade, against public policy, and void, in the absence of express statutory authority.

CORPORATIONS—POWER TO CREATE LIEN ON STOCK.—A corporation may make by-laws regulating the transfer of its stock, but it cannot thereby

create a secret lien on the stock which would adhere to it in the hands of a *bona fide* purchaser without notice.

CORPORATION—LIEN ON STOCK WHEN VALID.—A by-law of a banking corporation providing for a lien in its favor on its stock for an unpaid indebtedness due from the holder, although passed without authority, is binding on him and purchasers from him with notice when at the time of the adoption of such by-law and the transfer of the stock such holder was an officer of the bank and a party to the passage of the by-law.

CORPORATIONS—ASSIGNMENT OF STOCK.—An agreement between the holder of bank stock and his sureties that the former is to leave his stock in the bank as collateral security, to indemnify them against the payment of notes signed by them as security for him to enable him to raise money with which to buy the stock pledged, is not an assignment of the stock, legal or equitable.

CORPORATIONS—RIGHT TO CHARGE STOCK WITH INDEBTEDNESS OF HOLDER.—A corporation as successor to a partnership whose book-keeper has converted part of its property to his own use may charge his stock with his shortage accruing before the incorporation.

McKillop and Lewis and Ramsay, for the appellant.

Huston and Parrish, for the respondents.

[427] BURGESS, J. There is no substantial difference with respect to the facts in this case, as stated by counsel for the respective parties. They are about as follows:

From about the year 1868 up to the time of the organization of the plaintiff, Durfee and Wyatt were conducting a private bank in Rockport, Atchison county, Missouri, and Wanschaffe was with them in the capacity of clerk and book-keeper for several years prior to the organization of the plaintiff. In the latter part of the year 1872 Durfee sold his interest in said bank to W. A. Rice. On the thirty-first day of December, 1881, a meeting was held by Wyatt, Rice, Wanschaffe and others, for the purpose of organizing a "stock company" to carry on a banking business. At [428] that meeting it was agreed to organize a bank with a capital stock of $15,000, the stock of Durfee and Wyatt Bank to be taken at $10,000, and the balance was subscribed by Wanschaffe $4,800, Rice $4,800, Robert Hunter $200, and A. B. Durfee $200, Hunter and Durfee, however, were mere nominal subscribers, only for the purpose of organizing the bank; they never paid any thing for their stock. At this meeting Durfee and Rice were appointed a committee "on articles of incorporation," and Rice and Wanschaffe a committee on "by-laws."

On the third day of January, 1882, the parties met, and, after organizing by the selection of a chairman and secretary, Durfee and Rice reported "articles of incorporation," which were adopted and were ordered filed with the county court, and a certified copy sent to the secretary of state. The committee on by-laws then reported the by-laws read in evidence, which are the only ones, except an amended by-law requiring the officers and employees of the bank to give bond, adopted August 10, 1887. On the tenth day of January, 1882, articles of incorporation were issued by the secretary of state, declaring said parties duly incorporated as "The Bank of Atchison County," with a capital stock of $15,000. A. E. Wyatt, W. A. Rice, Alfred A. Wanschaffe, A. B. Durfee, and Robert Hunter were agreed upon as directors for the first year. The bank was duly organized on the second day of February, 1882, by the election of A. E. Wyatt, president, W. A. Rice, cashier, and the bank of Durfee and Wyatt was completely merged in this bank.

About the year 1883 Mr. Rice, cashier of the bank, died, and Mr. Wanschaffe was elected cashier in his stead, and continued to act as such up to the time of his death, January 4, 1888. Wanschaffe died by his own hand, and at the time of his death he was [439] indebted to the bank, as evidenced by the notes and accounts in proof, to the amount of $894, and was a defaulter. It is agreed that the total defalcation, as shown by the proof, is $6,303.84, and that of this shortage the amount of $3,196.94 was against Durfee and Wyatt; and the balance, $2,341.90, against the plaintiff.

The evidence discloses that at the time of the organization of the plaintiff, Wanschaffe had no money with which to pay for his stock, and that his friends helped him to raise the same by going security for him to John Smith, for $6,000, with which he paid therefor. It seems he paid a bonus of $1,200 in order to get into the concern. When the Smith note became due, Wanschaffe's friends borrowed the money from one Fairleigh with which to pay it, among others the defendants Hunter and Deusers going his security. To pay the Fairleigh note, money was borrowed from one Harms, $3,000, and one Cooper, $3,000, defendants Hunter and Deusers going security on the note to Harms, and other parties going security to Cooper. To pay the note to Cooper, money was borrowed from one Freihoffer, and the defendants Kenirim and Deitz became Wanschaffe's security therefor. After the death

of Wanschaffe, and before the institution of this suit, Hunter and Deusers paid the Harms note and interest, $3,750, and Kenirim and Deitz paid the Freihoffer note and interest, $3,430.

In the month of July, 1887, the plaintiff, at the request of Wanschaffe, canceled his certificate of stock for $5,000, and reissued the same in two certificates of $2,500 each. One of these is claimed by Kenirim and Deitz, and the other by Hunter and Deusers. The evidence also shows that it was agreed between Wanschaffe and his first securities that the stock should stand in pledge to secure them—that the stock was to be left in [440] the bank as surety for them against the payment of the Smith note, and that such was the agreement as to each successive note executed. That such was the understanding between Wanschaffe, Hunter, and Deusers surety on the note to Harms, which they paid. By agreement the stock was for that purpose left in the bank for them, but there was no manual delivery *in præsenti* of it. The amounts paid by these sureties for Wanschaffe represent the original purchase money of the stock with which he paid therefor.

To secure Kenirim and Deitz against the payment of the note to Freihoffer, Wanschaffe delivered to them stock certificate number 28 for $2,500, and a mortgage or bill of sale on the same, but the certificate was never transferred on the books of the plaintiff.

On the fourteenth day of March, 1888, the plaintiff commenced this suit, in the circuit court of Atchison county, against A. B. Durfee, administrator of the estate of Alfred Wanschaffe, deceased, Conrad Deitz, and John Kenirim, to establish a lien on the stock held by Kenirim and Deitz and that claimed by Hunter and Deusers. Afterwards Hunter and Deusers were, on their own motion, made defendants.

Kenirim and Deitz answered, setting up the payment of the notes upon which they were sureties, and the assignment and delivery of said bank stock to them by Wanschaffe. Hunter and Deusers answered, setting up the payment of the note upon which they were sureties; the agreement with Wanschaffe that his sureties were to hold his stock as security to indemnify them against the payment of said notes, and their agreement with Wanschaffe when they signed the last note with him; that the stock was turned over to them and left in the bank for them, and that the amount paid for him

was part of the purchase money for the stock pledged to them, and that they were entitled thereto.

441 Upon a trial the court rendered judgment against said administrator for the aggregate sum of $7,614.46, $6,303.84 of which was for money wrongfully converted, and that the plaintiff have the first lien on stock certificates numbers 18 and 29, the latter of which is claimed by Hunter and Deusers. That Kenirim and Deitz have the first lien on stock certificate number 28. That said shares of stock be sold and the proceeds arising from the sale of those first named be applied upon the plaintiff's judgment, etc., and those last named be first applied upon the payment of Kenirim and Deitz's claim, etc. Motions for new trial were in due time filed by the plaintiff against Kenirim and Deitz, and by Hunter and Deusers against the plaintiff. Both motions being overruled, the plaintiff appeals against Kenirim and Deitz, and Hunter and Deusers against the plaintiff.

It is claimed that the court erred in finding for Deitz and Kenirim as to the twenty-five shares of stock embraced in certificate number 28, because under the by-laws agreed to adopted and used by all of the stockholders, directors, and officers of the bank, Wanschaffe being one of them, a lien was reserved upon all the stock for all debts owing to the bank by any stockholder, and that such stock could not be transferred until such liabilities were paid.

Section 739 of the Revised Statutes of 1879, chapter 21, under which the plaintiff was organized, provides that: "The stock of every company formed under this act shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the company; but no shares shall be transferred until all previous calls thereon shall have been fully paid in." Section 720 provides that every corporation shall keep a book in which the transfer of the stock shall be registered, and another containing the names of the stockholders, 442 which shall be kept open thirty days previous to an election, for examination by stockholders; while section 706 provides that a corporation may make by-laws "not inconsistent with existing law, for the regulation of its affairs and for the transfer of its stock."

The sections of the by-laws relied upon by plaintiff provide that no transfer of stock shall be allowed or valid as long as the holder is in arrears to the bank, or in any form indebted to it, and that the bank reserves a lien upon all stock issued

or held by any stockholder, for the security of any debt owing in any form to said bank by such stockholder, whether the same be due or not due, or whether such liability be created before or after the issuance of such stock certificate.

The corporation had no power or authority under its charter to provide by ordinance that no transfer of stock should be allowed as long as the holder was in arrears to the bank or indebted to it, and that the bank reserved a lien upon all stock issued or held by any stockholder for the security of his indebtedness to the bank, as no such power was conferred upon it by the statute under which it was organized. When the law says that the stock shall be transferable in the manner prescribed by the by-laws of the corporation, it simply means the way in which it shall be transferred, by entry on the books or otherwise, but it is not to be inferred therefrom that the corporation had any authority to attach to such stock a lien in its favor, and especially is this so as against an innocent holder for value.

The stock was personal property, and, as was held by this court in the case of *Moore* v. *Bank of Commerce*, 52 Mo. 377, the right of alienation is an incident to it, "and a by-law prohibiting this right or imposing any restrictions on its exercise would be in restraint of trade and against public policy, and therefore void. Whether the [442] legislature could authorize such restraint is not involved in this record, and need not be passed on. The company had the power, as a cumulative mode of transfer, to have it placed upon the books of the company. But whether so entered or not, the title to the stock as between the former owner and the purchaser would pass by a sale or transfer by him or under his authority: See *St. Louis Perpetual Ins. Co.* v. *Goodfellow*, 9 Mo. 149"; *Chouteau Spring Co.* v. *Harris*, 20 Mo. 383; *Brinkerhoff Farris Trust & Sav. Co.* v. *Home Lumber Co.*, 118 Mo. 447.

In the case of *Bank etc.* v. *Pinson*, 58 Miss. 421, 38 Am. Rep. 330, the plaintiff's charter provided for a directory and a president, who were empowered to make "all needful rules and by-laws for the management of the business of the company, and the mode and manner of transferring its stock." Under this provision the corporation created a by-law that "the stock of the company shall be assignable only on the books of the company, and no transfer of stock shall be made by any stockholder who shall be indebted to the company; and certificates of stock shall contain upon them notice of

this provision." Certificates of stock in the corporation were issued to C., duly authenticated, and reciting the number of shares to which he was entitled, their nominal value, and that they were "transferable at the office, in person or by attorney"; C. borrowed money and assigned the certificates to the person from whom he borrowed the money as collateral security, and when the certificates of stock were presented to the bank for transfer on the books it was refused, and he brought an action for damages for such refusal. The bank defended on the ground that C. was indebted to it in an amount exceeding the value of his stock, and that under the by-law above quoted it had a lien upon [444] his stock for his indebtedness, and that he could not transfer his stock. At the time of the assignment the person to whom it was assigned had no actual notice of the lien claimed by the bank on C.'s stock. It was held that the assignee of the stock did not have constructive notice by the charter that there would be any by-law preventing a stockholder indebted to the bank from disposing of his stock, but only that there would be some regulation of the mode and manner of the transfer, and that she had the right to presume that such regulation was announced in the certificate in the words, "transferable at the office in person or by attorney," and was not bound to inquire any further. And she being an innocent purchaser for value without notice, actual or constructive, of the bank's lien on the stock, was not to the extent of her lien affected thereby.

It was held by the supreme court of California in the case of *Anglo-Californian Bank* v. *Grangers' Bank*, 63 Cal. 359, that "the defendant might make by-laws regulating the transfer of stock, but it could not, under the power to regulate the transfer of stock, create a secret lien upon it, which would adhere to it in the hands of a *bona fide* purchaser for value and without notice." The same rule is announced in *Bullard* v. *Bank*, 18 Wall. 589, and in *Driscoll* v. *West Bradley etc. Mfg. Co.*, 59 N. Y. 96, in which it was held that a corporation could not—under the power to make laws for the regulation of the transfer of the stock—"create or declare a lien upon the stock by by-law, nor refuse to permit a transfer until the indebtedness of the stockholder to the company be paid." Restrictions upon the transfer of such stock must have their source in legislative enactment; the corporation itself could not

create such impediments: *Carroll* v. *Mullanphy Sav. Bank*, 8 Mo. App. 249.

The plaintiff had no claim to a lien upon the stock [445] at common law, and unless such lien was given by statute it had none, and a by-law declaring such lien in favor of the company, being without authority, express or clearly implied, would be an interference with the common rights of property and the dealings of third persons, and would prevent the transfer and delivery of property: *Mechanics' etc. Bank* v. *Smith*, 19 Johns. 115; *Driscoll* v. *West Bradley etc. Mfg. Co.*, 59 N. Y. 96.

The cases of *Mechanics' Bank* v. *Merchants' Bank*, 45 Mo. 513, 100 Am. Dec. 388, and *St. Louis Perpetual Ins. Co.* v. *Goodfellow*, 9 Mo. 149, relied on by plaintiffs as holding to a different rule, were bottomed upon an express provision in the charters of the companies giving them the authority to adopt the by-laws prohibiting the transfer, where the owner was in debt to the company. It makes no difference, however, how the indebtedness arose, whether by contract or by embezzling the moneys of the banks: *Mechanics' Bank* v. *Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388.

As between the plaintiff and Wanschaffe, we think the by-law providing for a lien in favor of the bank of the stock for the unpaid indebtedness, although passed without authority, was binding on him and purchasers of the stock from him with notice of such lien. At the time of the adoption of the by-law he was an officer of the bank, and continued to be such for many months thereafter, and was at the time of the transfer of the stock in controversy. As he was a party to the passage of the by-law, and always recognized it as being in force, he should not now be heard to say that it had never been legally adopted.

The purpose of requiring the transfer of the stock on the books of the bank was for its benefit and those dealing with it, that they might know who were the shareholders entitled to vote at the meetings and receive dividends. The defendants in this appeal were holders of the shares in good faith, for value and without notice. [446] The stock was delivered into their possession, as well, also, as a mortgage thereon executed by Wanschaffe, all of which was subsequently placed by them in the vault of the bank for safe-keeping, with the knowledge of the bank. The stock, under the statute, is declared to be personal property, and passed to the

defendants, who were innocent holders, without being affected by any secret lien in favor of the plaintiff. "Such certificates," says Davis, J., in *Bank* v. *Lanier*, 11 Wall. 377, "although neither in form or character negotiable paper, approximate to it as nearly as practicable."

The agreement between Wanschaffe, Hunter, and Deusers, to the effect that Wanschaffe would leave his stock in bank as collateral, to indemnify them against the payment of the notes which they had signed as security for him, to enable him to raise the money to buy his bank stock, was not an assignment of the stock, equitable or otherwise. There was no manual delivery of it, and it never at any time passed from under the dominion and control of Wanschaffe. On the contrary, it remained in the vault of the bank just as it was at the time the promise was made. There was not even an agreement in writing between the parties in regard thereto: *Vanstone* v. *Goodwin*, 42 Mo. App. 39. Not only this, but Hunter was during all this time, and was at the time of the trial in the court below, a director of the bank, and will be presumed to know all about the by-law which gave the bank a lien against the stock for any indebtedness to the bank by the holder thereof, and in so far as he was concerned was not an innocent holder of the stock for value.

Nor are these defendants in a position to invoke the doctrine of subrogation in their behalf, for in so doing they could only succeed to the rights of their principal, Wanschaffe, and nothing more, who was a party to the passage of the by-law giving the bank a [447] lien on all bank stock for debts due the bank by any holder thereof. They could occupy no more vantage ground than did Wanschaffe. If, then, we are correct in these conclusions which we think borne out by both reason and authority, even in the absence of any by-law, the plaintiff would have had the right to set off Wanschaffe's indebtedness to it against this stock.

There was no error committed in charging the stock with the amount of $3,196 shortage account prior to the organization of the plaintiff bank. Although this shortage accrued while Durfee and Wyatt were the owners of the bank, yet plaintiff succeeded to all of their rights, and it took this shortage as well as all the other bank property to make up the estimate of $10,000, at which their assets were turned into plaintiff corporation.

Upon a review of all the authorities, and a full consideration of all the questions raised by counsel, we are of opinion that the case should be in all things affirmed, and it is so ordered.

All of this division concur.

CORPORATIONS—LIEN ON STOCK.—Where a banking corporation is authorized by its charter to make rules regulating the transfer of its stock, a by-law adopted by it forbidding the transfer of stock so long as the owner is indebted to the corporation is valid, though inconsistent with the general law of the state governing the transfer of stock: *Mechanics' Bank* v. *Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388. If it is the usage of a bank not to permit stock to be transferred while the holder is indebted to the bank, a stockholder who becomes its debtor knowing such usage is bound by it: *Morgan* v. *Bank*, 8 Serg. & R. 73; 11 Am. Dec. 575, and note. The assignee of a holder of bank stock takes it subject to the lien on the stock secured to the bank by its charter, and of which he is charged with notice: *Reese* v. *Bank*, 14 Md. 271; 74 Am. Dec. 536, and note. A corporation which issues a certificate of stock, stating on its face that it is transferable, has not a lien on such stock as against a purchaser thereof: *Fitzhugh* v. *Bank*, 3 T. B. Mon. 126; 16 Am. Dec. 90, and note; *Saryent* v. *Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306, is to the same effect. Where a corporation has not a lien on its stock created by charter, by statute, or usage, it cannot resist or prevent a transfer of the stock by any shareholder to someone else: *Gemmell* v. *Davis*, 75 Md. 546; 32 Am. St. Rep. 412, and note. See the note to *Sayre* v. *Louisville etc. Assn.*, 85 Am. Dec. 619.

CORPORATIONS—ASSIGNMENT OF STOCK AS COLLATERAL SECURITY—EFFECT ON LIEN OF CORPORATION.—An assignment by a stockholder of the shares of a bank, made for the purpose of collateral security, although made without a transfer on the books of the corporation as required, is effectual as against the bank asserting a lien for a debt of the stockholder contrary to provisions of the statute: *Nicollet Nat. Bank* v. *City Bank*, 38 Minn. 85; 8 Am. St. Rep. 643. But compare *Jennings* v. *Bank*, 79 Cal. 323; 12 Am. St. Rep. 145, and note.

STATE *v.* JOHNSON.

[118 MISSOURI, 491.]

CRIMINAL PRACTICE—INDORSEMENT OF NAME OF WITNESS ON INDICTMENT. An objection that a witness is not competent to testify for the reason that his name is not indorsed on the indictment cannot be raised for the first time on motion for a new trial.

EVIDENCE—DYING DECLARATIONS WHEN ADMISSIBLE.—To make dying declarations admissible in evidence there must not only be an actual nearness of death, but an absolute conviction of it in the mind of the declarant. It is not enough that he should have thought that he should ultimately never recover; the declaration must have been made under an impression of almost immediate dissolution.

EVIDENCE—DYING DECLARATIONS WHEN INADMISSIBLE.—Dying declarations are inadmissible in evidence when fragmentary or incomplete, or

when the declarant did not state who committed the crime concerning which such declarations are sought to be introduced.

EVIDENCE—DYING DECLARATIONS.—PROPRIETY OF ADMITTING dying declarations is a preliminary question for the determination of the court before they are allowed to go to the jury; but if they are improperly permitted to go to the jury the error can be corrected on appeal.

EVIDENCE—DYING DECLARATIONS—EFFECT OF IMPROPERLY ADMITTING.—A conviction must be set aside when dying declarations upon which it is probably based are improperly admitted in evidence, although other evidence tends to establish guilt, as it cannot be determined how much such declarations may have influenced either the verdict or the punishment assessed.

EVIDENCE—JUDICIAL NOTICE.—Courts take judicial notice that tobacco when taken into the stomach may produce nauseating effects.

TRIAL and conviction under an indictment for manslaughter. The deceased, Keene, together with the defendant Johnson and some others, were proceeding towards their homes on horseback on Friday, March 11, 1892. While on the way a quarrel sprang up between deceased and the defendant, the result of which was that both parties alighted from their horses and engaged in a fight. The deceased fell or was knocked down, the defendant got on top of him, and upon the representation that the deceased had swallowed a chew of tobacco he was allowed to get up. In the mean time his horse had ran away. After getting on his feet he walked a quarter of a mile, and then got upon a horse behind one of his companions and rode home, saying on the way that he was not hurt. After he reached home he became sick and began to vomit, and soon lapsed into unconsciousness. A physician was then procured, but the deceased did not regain consciousness enough to make any statement. He died the next night, and an autopsy on his body disclosed a contusion near his left ear and an extravasation of blood on the right side of the head, which in the opinion of physicians was caused by a blow on or falling on his left ear, and that such blow or fall was the cause of death. On the trial Mrs. Keene, the wife of the deceased, testified to certain dying declarations alleged to have been made by the deceased soon after arriving home, and before he lapsed into unconsciousness. This testimony given against the objection of defendant is as follows:

"Q. Now, you can just turn to the jury and tell the condition he was in when he came home. A. When he came home his head was bloody, and I asked him what was the

trouble and he said Robert Johnson had hit him and knocked him down.

"Q. You saw his head was bloody? A. Yes, sir; I washed the blood off.

"Q. What part of his head appeared to be bloody? A. On the left side of his head and his ear.

"Q. Did you notice any injury to his ear? A. Yes, sir; it was still bleeding.

"Q. His ear was still bleeding? A. Yes, sir.

"Q. What time in the evening was it when he came home? A. About dusk.

"Q. How long did he remain in that condition, that is, conscious? A. Well, I don't know exactly how long, but from an hour and a half or two hours.

"Q. That he remained conscious? A. Yes, sir.

"Q. You can state whether he was conscious of the fact that he was going to die before he died? A. Yes, sir; he was.

"Q. What did he do to indicate that he knew that he was going to die? A. In the first place he bid us good-bye—called the children first.

"Q. What time was that? A. It was on the night of the eleventh—of Friday.

"Q. How long after he come home? A. It was n't a great while, because he was n't conscious a great while.

"Q. This was before he became unconscious? A. Yes, sir; he knew every thing.

"Q. Just tell the jury what he did before he told you what he did? A. He went to bed as soon as he got home; then he called to the family.

"Q. What did he say that indicated to you that he knew he was going to die? A. He just said—

"Q. What did he call you for and what did he call the family for? What did he say to the family? A. He told us that he was bound to die, was one thing. I can't tell it word for word, somehow.

"Q. But he told you that he was bound to die? A. Yes, sir; that he was done work for his children and that they would soon be done for.

"Q. Did he make any statement as to how he was injured, and what was the cause of his death?

"*Mr. Francisco*—I make the objection that there has not been the proper foundation for any statement that may have been made, and for that reason is incompetent. Overruled

by the court; to which ruling the defendant, by his counsel, then and there duly excepted at the time.

"*Mr. Francisco*—Who was present, Mrs. Keene, at this time? A. When Mr. Keene come home?

"Q. Yes. A. His family was at home, and my brother.

"Q. What was his name? A. Marquis. He come home with him, but he was n't in the house but a little while.

"Q. Was Mr. Keene vomiting when he come home? A. He vomited a little while after he come home.

"Q. Was this vomiting before this conversation or afterward? A. It was between times.

"Q. He vomited very severely, did n't he? A. He vomited once.

"Q. Did he strain hard in vomiting? A. No, sir.

"Q. Did he complain of having swallowed a chew of tobacco? A. He said he swallowed a chew of tobacco.

"Q. Did he say that was the trouble with him? A. No, sir; he said it was the lick that was the trouble.

"Q. Who was present, now, when you had the talk with him? A. The family.

"Q. Was Marquis Young there? A. No, sir; he called for him, but I told him he was away and would be back in a few minutes. He said it was too late for him.

"*Mr Silvers*—Now, Mrs. Keene, just turn to the jury here and tell the jury what he said to you as to what caused his death. [Objected to by defendant's counsel for the reasons heretofore stated. Overruled by the court; to which ruling the defendant by his counsel then and there duly excepted at the time.] A. He came home and said that Robert Johnson hit him and knocked him to the ground, and then jumped on him and choked him, and then bit him.

"Q. Where did he say he bit him? A. He said he bit him on that ear where the first lick was.

"Q. When did he say he struck him first? A. When he had n't yet got steady on the ground—when he was getting off of his horse.

"Q. Any other statements that he may have made about it you may state? A. He went on to talk to the family and told them that he was done for his day, that the lick had killed him."

On cross-examination, Mrs. Keene also testified:

"*Mr. Francisco*—Q. Was he conscious the next day? A. No, sir; he was not.

"Q. Did he make any statement after the doctor come? A. No, sir. He vomited as I told you in the afternoon yesterday, but he did not vomit hard. He just threw up. He threw up a piece of tobacco.

"Q. Did he throw up a large chew of tobacco. A. It wasn't so very large. The family was all there all together, and he spoke up so that all heard it—that the lick and the injuries had numbered his days.

"Q. Did the doctor then know that he had received the lick? A. No, sir; the doctor had n't got there then."

Miss Gertie Keene, the daughter of the deceased, who was not present either at the preliminary examination or at the inquest, testified:

"Q. Are you the daughter of Samuel Keene? A. Yes, sir.

"Q. Do you recollect the circumstance of his coming home from Butler in March last, March 11th? A. I recollect what he told me.

"Q. Did you hear any statements made by him? A. Yes, sir.

"Q. Now, just tell the jury what he said on that occasion?

"*Mr. Francisco*—We object to that because no foundation has been laid for such testimony. Overruled by the court; to which ruling the defendant, by his counsel, then and there duly excepted at the time. A. Why, he said that Robert Johnson hit him on the side of the head and knocked him down before he had time to get his foot out of the stirrup, and jumped on him and beat him and then bit him.

"Q. Where did he say he had bit him? A. Right here on this side [designating].

"Q. Did he state on which side of the head he hit him on? A. On the left side."

On cross-examination, the witness testified:

"Q. How long was it after he come home that he said that? A. I don't know just exactly how long it was; did n't have any timepiece, but it was n't but a short time.

"Q. Did he vomit any after he come home? A. He vomited once.

"Q. Did he complain of having swallowed a chew of tobacco? A. Yes, sir; he said that he did.

"Q. This was before the doctor came there? A. Yes, sir; and before he went to bed. He was laying on the bed while he was talking.

"Q. Did he vomit any after that talk? A. He was talking and vomiting at the same time.

"Q. Pretty sick? A. Yes, sir.

"Q. Did he seem to be sick at the stomach? A. He complained of his stomach hurting him."

Francisco Brothers, for the appellant.

R. F. Walker, attorney general, for the state.

500 SHERWOOD, J. 1. Complaint is made that the two witnesses, Mrs. Keene and her daughter, were allowed to testify, though their names were not indorsed on the indictment. But this objection was not opportunely taken, and could not be raised for the first time in the motion for a new trial: *State* v. *Roy*, 83 Mo. 268; *State* v. *Griffin*, 87 Mo. 608.

501 2. A more serious objection to the testimony of these witnesses is in regard to the alleged dying declarations of deceased. Was their testimony, as delivered, competent to establish such declarations? One rule regarding such declarations, well established in this state and elsewhere, is that in order to make them admissible in evidence there must not only be an actual nearness of death, but an absolute conviction of it in the mind of the declarant: *Regina* v. *Dalmas*, 1 Cox C. C. 95.

It is not enough that the declarant should have thought that he should ultimately never recover; the declaration should be made under an impression of almost immediate dissolution: *Rex* v. *Van Butchell*, 3 Car. & P. 629; *Regina* v. *Forester*, 10 Cox C. C. 368; 1 Greenleaf on Evidence, 14th ed., sec. 158; Starkie on Evidence, 10th ed., 38, and cases cited; *People* v. *Green*, 1 Park. Cr. 11; *State* v. *Simon*, 50 Mo. 370; *State* v. *McCanon*, 51 Mo. 160; *State* v. *Partlow*, 90 Mo. 608; 59 Am. Rep. 31; *Brown* v. *State*, 32 Miss. 433; *Starkey* v. *People*, 17 Ill. 21, and cases cited; Wharton on Homicide, sec. 747.

It is this fact of nearness of death, combined with another fact, one equally as important, a profound and settled belief in such nearness of dissolution—that redeems such declarations from the domain of hearsay, and dispenses with opportunity for cross-examination, one of the most indispensable tests and analyses afforded for sifting the statements of an ordinary witness. As this great safeguard of the truth of testimony cannot be thrown around such declarations, courts

have been exceedingly careful that there should be a rigid adherence to the principles upon which, and the preservation of the constituent elements from which, they are formed. This view is aptly presented [502] by Turley, J.: "Testimony of this character is only admitted from necessity, and an abuse of it is guarded against by the law with most minute particularity. There is no one principle better established than that such declarations shall not be received, unless the proof clearly shows that the deceased was *in extremis* (perhaps the words *in articulo mortis* which are used by some of the authorities to express this condition, are more accurate), and that he or she, at the time of making them, was fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact": *Smith* v. *State*, 9 Humph. 9.

The principle, as stated by Lord Chief Baron Eyre, on which this species of evidence is admitted, is "that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice": *Woodcock's case*, 1 Leach, 503.

Touching the same subject, Byles, J., said: "Dying declarations ought to be admitted with scrupulous, and, I had almost said, with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subject to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions, and of unintentional misrepresentations, both by the declarant and the witness, as this case shows. In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be no [503] hope whatever": *Regina* v. *Jenkins*, L. R. 1 C. C. 191.

The case at bar does not meet the requirements of the rule mentioned. Two men get down in the public road and engage in a fight; after scuffling awhile one falls, or is knocked, to the ground, the other one gets on top of him, and the under

one, on the representation that he has swallowed a chew of tobacco, is allowed to get up. Getting on his feet, he walks a quarter of a mile, gets up behind his companion and rides home, and on the way there laughingly says he was not hurt. After he reaches home, however, he grows sick and vomits up the chew of tobacco, and then, while vomiting, tells his wife and daughter he is going to die, etc., etc. The nauseating effects of tobacco when swallowed need no comments; it is matter of common knowledge, and, therefore, of judicial notice. Besides, the witness, Mrs. Keene, was not allowed to tell her story in her own way; she was continually having leading suggestions and questions offered to her by the officiousness of the prosecuting officer. At the time deceased made these declarations he was without a physician; had no external indications of injury, and no one had apprised him that he was in danger. He may have been "conscious," and, though conscious, still may have been entirely without any absolute conviction and fixed belief of "almost immediate dissolution." As Judge Wagner appropriately observes in *State* v. *Simon*, 50 Mo. *loc. cit.* 375: "Any person who has been accustomed to attend on those who are injured, or are very ill, knows how common it is for them to say that they will never recover, or that they will die, when there is no good or sufficient reason for the apprehension, and they are not conscious themselves that they are in any real danger. Such expressions are often the result of impatience, restlessness, or great suffering. But, at the [504] same time, let the attending physician inform them that there is no hope and that they must die, and they will be perfectly startled."

3. There are other objections to the admission of the declarations; 1. They are clearly fragmentary: Wharton on Criminal Evidence, sec. 299; Wharton on Homicide, sec. 770; 2. And though the substance of dying declarations are admissible, yet this is not so where such declarations are incomplete. Here the witnesses do not pretend to give either the words or the substance of what deceased said, or all that he said; 3. Nor does it appear that the declarant stated, as part of his alleged dying declarations, who it was that struck him the blow and knocked him down. Mrs. Keene says he made such a statement when he first came into the house, but she does not state that this information was repeated when the alleged dying declarations came to be made.

4. The propriety of the admission of dying declarations is a preliminary question for the determination of the court before they are allowed to go to the jury: Wharton on Criminal Evidence, 9th ed., sec. 297; *State* v. *Simon*, 50 Mo. 370. In the present case this course was not pursued, but the testimony was allowed to go directly to the jury without any preliminary determination by the court. But, even if the evidence to establish such declarations is admitted in the usual way, still, if improperly permitted to go to the jury, this is an error which can be corrected on appeal: *State* v. *Simon*, 50 Mo. 370; Wharton on Criminal Evidence, sec. 299.

5. As already seen, there was other evidence tending to establish defendant's guilt beside the erroneously admitted declarations; but it cannot be determined how much influence the latter had, either on the verdict or on the amount of the punishment assessed: *State* v. *McCanon*, 51 Mo. 160.

505 For the errors aforesaid, the judgment should be reversed, and the cause remanded.

BURGESS, J., concurred.

GANTT, P. J., in a separate opinion as to paragraph 2.

SEPARATE OPINION.

GANTT, P. J. I concur in reversing and remanding the cause, and recognize the law as stated by my learned associate; but my concurrence in the reversal is based upon the fact that it does not sufficiently appear that the deceased had expressed his belief that he was bound to die, before he stated that defendant had inflicted the blow that caused his death. If the conversation with his family in regard to his consciousness of approaching death did in fact precede the statement as to defendant striking and biting him, then I hold it was competent. I cannot bring myself to regard it as the statement of one merely suffering from nausea caused by swallowing tobacco. I do not think that many men would be moved to bid adieu to their loved ones forever merely from having inadvertently swallowed tobacco juice.

That deceased's apprehensions that his death was imminent were well founded appears from the fact that in two hours he passed into a state of coma, from which he never fully emerged.

The evidence ought to be fairly obtained, but the fact that a dying declaration is made in response to questions does not render it inadmissible.

court below were in favor of the respondents. The appellant filed his motion for a new trial, which was overruled, and from the order of the court, overruling his motion for a new trial, this appeal is taken.

The facts of the case are substantially as follows: "The deceased, Rebecca Githens, was the mother of the respondents. On the second day of January, 1888, the deceased, who was then seised in fee of the premises in dispute, executed a deed to the demanded premises to the respondents. On the same day the respondents executed a lease to the same premises to the deceased for the term of her natural life, and delivered the same to the deceased. The proof is not positive that the deed was actually then delivered by the grantor to the grantees; that is, by manual delivery. Some months after the execution of [99] the said deed and lease, the deceased, in company with Mrs. Flaharty, one of the grantees, took both of said instruments to the Gallatin Valley Bank, and delivered them to the assistant cashier. This inscription was written on the outside of said paper: "To deliver to Mrs. Githens, and, in case of her death, to Mrs. Flaharty." Mrs. Githens died some months after the delivery of these papers to the bank, without even calling for them, and without even attempting or expressing any desire to regain the possession of them. After the death of Mrs. Githens the papers were delivered to Mrs. Flaharty. While these papers were in the bank, Mrs. Githens spoke of them to witnesses, saying the "girls' deed" (meaning the respondents) was in the bank. The evidence also shows that the deceased occupied the demanded premises under said lease from its execution until her death. After the death of Mrs. Githens the respondents took possession of the demanded premises, and have exercised control thereof ever since. The deceased, in her lifetime, while said papers were in the bank, spoke of both the deed and lease being in the bank, and of the deed as belonging to the respondents. Upon this showing of facts appellant contends there was no delivery of said deed; that the deceased never lost control over it during her lifetime, and that the delivery thereof was void. Counsel for the appellant concedes that if the deed was delivered he has no case. Respondents, of course, claim that the deed was delivered. What, then, is a delivery? And how can the delivery be shown?

In 5 American and English Encyclopedia of Law, page 447, we find this doctrine asserted: "The intention always

controls the determination of what constitutes a sufficient delivery; and it may be manifested by acts or by words, or by both, in the most informal manner. But either acts or words manifesting the intention must be present, in order to constitute a good delivery. But the deed need not be actually delivered, if the grantor intends the execution to have the effect of a delivery, and the parties act upon this presumption. Delivery will be presumed from the fact that the deed was executed before the witnesses, and declared to be delivered in their presence": And see cases cited in notes.

In Washburn on Real Property (vol. 3, 5th ed., p. 305, par. 28) the author says: "Thus, a deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased": See authorities cited in note.

In Devlin on Deeds (vol. 1, sec. 262) the author holds the doctrine of delivery of a deed to be one of intention: "As no particular form of delivery is required, the question whether there was a delivery of a deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. 'The doctrine seems to be settled beyond a reasonable doubt,' remarks Justice Atwater, 'that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, though the deed remains in the hands of the grantor. The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee.' A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to

be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law. A deed was held complete and valid where it had been prepared for execution, read, signed, and acknowledged before a proper officer, notwithstanding the testimony of the witnesses present at its execution that there was no formal delivery, and the fact that the deed, after the grantor's death, was found among his private papers in his desk."

In *Doe dem. Garnons* v. *Knight*, 5 Barn. & C. 671; 11 [101] Eng. Com. L. 632, Bayley, J., holds that "where a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential"; and cites a great number of cases in support of this doctrine.

In *Wheelwright* v. *Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66, a case very similar to the one at bar, Parsons, C. J., delivering the opinion of the court, holds that "a deed signed, sealed, delivered, and acknowledged, which is committed to a third person, as the deed to the grantor, to be delivered over to the grantee, on a future event, is the deed of the grantor presently; and the third person is a trustee of it for the grantee."

In *Woodward* v. *Camp*, 22 Conn. 459, 460, Waite, J., speaking of what constitutes a valid delivery of a deed, says: "And, in order to constitute a valid delivery, it is not necessary that it should be delivered personally to the grantee. It will be sufficient if delivered to some third person for the use of the grantee, although the latter was not present at the time, had no knowledge of the existence of the deed, and never gave any authority to the person receiving it to act in his behalf: *Merrills* v. *Swift*, 18 Conn. 257; 46 Am. Dec. 315. And if a deed be delivered to a third person, to be by him kept, during the life of the grantor, subject to his order, and at his death, if not previously recalled, to be delivered over to the grantee, and the grantor die without having recalled the deed, such delivery will become effectual, and the title of the grantee consummated, in the death of the grantor: *Belden* v. *Carter*, 4 Day, 66; 4 Am. Dec. 185. According to these authorities,

had the deed, in the present case, been delivered to some third person, to have been kept during the life of Mrs. Camp, and then delivered to the grantee, such delivery, upon her death, would have become perfected, and the title would have vested in him."

In *Farrar* v. *Bridges*, 5 Humph. 411, 42 Am. Dec. 439, the court say: "A formal, ceremonious delivery of a deed is not 102 essential to its validity. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor": See authorities cited.

In *Thatcher* v. *St. Andrew's Church*, 37 Mich. 269, speaking of what constitutes the delivery of a deed, the court say: "The act of delivery is not, necessarily, a transfer of the possession of the instrument to the grantee, and an acceptance by him; but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument. The deed may be delivered to the grantee, or to a stranger unknown to the person for whose benefit it is made; and it has been held that such was a good delivery, when assented to by the grantee after the death of the grantor": See authorities cited.

In *McLure* v. *Colclough*, 17 Ala. 96, the court say, speaking of what constitutes delivery: "Then, although there was no delivery by the hand, there was enough to constitute a good delivery in law. This may be accomplished by mere words, or by such words and actions as indicate a clear intention that the deed shall be considered as executed, as when a party to an instrument seals it, and declares in the presence of a witness that he delivers it as his deed, but keeps it in his own possession and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and actual delivery to the party who is to take by the deed, or to any person for his use, is not essential": *Doe dem. Garnons* v. *Knight*, 5 Barn. & C. 671.

In *Belden* v. *Carter*, 4 Day, 66, 4 Am. Dec. 185, a Connecticut case, depending on this statement of facts: "Delivery of deed. When takes effect. A grantor, having signed, sealed, and, acknowledged a deed, took it up, in the absence of the grantee, and said to another: 'Take this deed and keep it. If [103] I never call for it, deliver it to B after my death. If I call for it, deliver it to me.' The party then took the deed, and, the grantor dying soon afterwards, and never having called for it, it was delivered to the grantee." Upon these facts the court say and hold: "The grantor delivered the deed to Wright with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery."

In *Newton* v. *Bealer*, 41 Iowa, 334, in a case nearly on all fours with the case at bar, Day, J., delivering the opinion of the court, on page 339, says: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When, within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be

found, which, as he supposed, had the effect to fix his property so that there [104] would be no 'fussing' about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property, and any construction of the law which ignores this intention, and defeats this purpose, prefers shadow to substance": See cases cited.

In *Hathaway* v. *Payne*, 34 N. Y. 92, a case wherein the facts are as nearly like the facts in the case at bar as usually happens, the court hold that: "where a deed is to be delivered to the grantee on the death of the grantor the title, by relation, passes at the time the deed was left for delivery." Potter, J., delivered the opinion in this case, and, after viewing at great lengths the facts, in stating the law and citing the authorities, says: "Looking to the language of the agreement itself, for the purpose and intent of this conveyance, it left no condition to be performed before delivery. It required nothing but the lapse of time, to wit, the death of both grantors, when Herrendeen, the agent, trustee, or depositary of the deed (by whatever name he may be called), by mutual direction of the parties, not alone that of the grantor, who alone could not revoke a mutual agreement, immediately to deliver it, as a good and valid conveyance of all the lands therein contained. If we look at the intent of the parties to the deed, as manifested by their acts, independent of the language of their agreement —the one granting, the other accepting, the grant of this part of the same premises—it is equally apparent that the parties intended the first deed as a present conveyance. In *Ruggles* v. *Lawson*, 13 Johns. 285, 7 Am. Dec. 375, A executed a deed of lands, in consideration of natural love and affection, to his two sons, and delivered it to C, to be delivered to his sons in case A should die without making a will; and, A having died without a will, C delivered the deed to the sons. It was held that this was a valid deed, and took effect from the first delivery; that this was not an escrow. In *Tooley* v. *Dibble*, 2 Hill, 641, a father signed and sealed a deed purporting to convey to his son a farm, placing the deed in the hands of B, with instructions to deliver it after the father's death, but not before, unless both parties called for it; and after the father died B delivered the deed accordingly. It was held that the title of the son took effect, by relation, from [105] the time the deed was left with B, and that the son's quitclaim, executed intermediate the leaving the deed with B, and the father's

death, though importing a mere conveyance of the son's 'right in expectancy' in the land, would pass his title. The cases of *Goodell* v. *Pierce*, 2 Hill, 659, and *Hunter* v. *Hunter*, 17 Barb. 25, are but confirmations of this view of the title taking effect from the first delivery of the deed. In the case of *Belden* v. *Carter*, reported in 4 Day, 66, 4 Am. Dec. 185, a deed was delivered to a third person to keep, and, if not called for, to deliver it after the death of the grantor. It was held that by legal operation it became the deed of the grantor presently, and that the depositary held it as a trustee for the use of the grantee, and that the title became consummate in the grantee by the death of the grantor, and the deed took effect, by relation, from the time of the first delivery. In the case of *Wheelwright* v. *Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66, a distinction is made which I regard as sound, and which I think has not been questioned since, that applies to this case. It was held that a deed, signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently, and the third person is a trustee of it for the grantee. But if it be delivered to the third person as the writing or escrow of the grantor, to be delivered on some future event, it is not the grantor's deed until the second delivery. That is, its being a present deed depends upon the fact whether it was delivered as an escrow. The cases can be multiplied, each varying from every other by some nice shade of difference, upon the question whether, in the present case, the deed was an escrow in the hands of the depositary, or whether the depositary was made the trustee of the grantor. In the former case a second delivery is generally required before the title passes; in the latter the title passes at the instant of delivering the deed to the depositary. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of an intent on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement, to be performed before delivery, which in law would create it an escrow; [106] and presumptions arising from the language of the agreement, being taken most strongly against the grantor, forbid any implication of its being an escrow. I think, therefore, that if the case depended upon this point, raised by the plaintiff on the assumption that there was no such delivery of the deed

of 1839 as to pass the title to the defendant, he must also fail. There is another reason, which exists both at common law and by the statute (which adopted the common law in this respect) which is controlling—"that, in the construction of every instrument creating or conveying any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." And, in the case just cited, Denio, C. J., dissents from part of the opinion of the court, but agrees with the court as to the law concerning the delivery of deeds in such cases, and, on page 113 of the opinion cited, says: "They do [referring to cases cited on the question as to what is a sufficient delivery of a deed], however, I think, prove that a deed may be delivered to a third person, as this was, with instructions to be finally delivered to the grantee after the death of the grantor. In such a case the weight of authority is, that no title passes until the final delivery, and that then and thereafter the title is, by relation, deemed to have vested as of the time of the first delivery to the third person. If it were an original question I should suppose that such a transaction was of a testamentary character, and that it would be inoperative for want of the attestation required by the statute of wills. But the cases establish the rule as I have stated, and they should not now be disturbed": See authorities he cites on this point.

Authorities might be cited to any extent in support of the doctrine that a manual delivery of a deed is not an absolutely essential requisite to its validity; that "the question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." In this case the grantor having executed the deed to the grantees, and having received back from them at the same time a lease for the term of her natural life, for the same premises, and she having accepted said [107] lease, depositing it, with the deed to the demanded premises, with the depositary, with instructions to deliver the deed to the grantees in event of her death, and having never recalled the deed, or made any attempt or expressed any desire to regain control thereof, but in the mean time spoke of the deed as being the deed of the grantees, in the hands of the depositary, and occupied the premises as the tenant of respondents, and in all respects

having treated the deed as belonging to the grantees, and both parties having acted concurrently upon the theory that the deed was complete, as well as the delivery thereof, the opinion seems irresistible that the facts show a valid delivery of the deed in this case. Many of the authorities cited in this opinion have been so cited, not that we deemed it necessary to a determination of the case at bar, but more for the purpose of showing the trend of the authorities, and the extent to which they go in support of the doctrine discussed in this case. Some of these authorities go further than perhaps this court would go under like circumstances; but they all support the position we take—that in the case at bar there was a valid delivery of the deed. The acts, words, and conduct of the parties—especially the giving of the lease to the demanded premises by the grantees of the deed to the grantor contemporaneously with the execution of the deed, and her occupying the premises under said lease until her death—establish beyond controversy that the parties considered the deed complete, as well as the delivery thereof. This opinion is not to be interpreted as establishing any new rule in relation to the testamentary disposition of property, or as expressing any opinion as to the rights of creditors in cases resting upon like facts and circumstances. We simply decide that in this case there was a delivery of the deed, and complete consummation thereof, before the death of the grantor.

Judgment of the lower court is affirmed.

HARWOOD, J., and DE WITT, J., concur.

DEEDS—DELIVERY OF, WHEN SUFFICIENT.—A deed signed, sealed, acknowledged, and delivered to the custody of a third person as the deed of the grantor, to be delivered over to the grantee on some future event, takes effect presently as the deed of the grantor: *Wheelwright* v. *Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66, and note; *Belden* v. *Carter*, 4 Day, 66; 4 Am. Dec. 185, and note; *Hatch* v. *Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Ruggles* v. *Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Foster* v. *Mansfield*, 3 Met. 412; 37 Am. Dec. 154, and note; *Peavey* v. *Tilton*, 18 N. H. 151; 45 Am. Dec. 365, and note; *Vreeland* v. *Vreeland*, 48 N. J. Eq. 56; *White* v. *Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671; *Sneathen* v. *Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note. See, also, the extended notes to *Fuss* v. *Smith*, 58 Am Rep. 291, and *Jones* v. *Jones*, 16 Am. Dec. 39.

DEEDS—DELIVERY—INTENTION.—If a grantor intends when executing a deed, to be understood as delivering it, that will be sufficient as a delivery. *Hayes* v. *Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326, and note. The delivery of a deed includes not only an act by which the grantor parts with the pos-

session of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee: *Porter* v. *Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Weber* v. *Christen*, 121 Ill. 91; 2 Am. St. Rep. 68, and note: See the extended notes to *Byars* v. *Spencer*, 40 Am. Rep. 217; *Fain* v. *Smith*, 58 Am. Rep. 290, and the note to *Walker* v. *Walker*, 89 Am. Dec. 447.

CHOATE *v.* SPENCER.

[13 MONTANA, 127.]

COURTS—SEALS.—A WRIT ISSUED FROM A COURT HAVING A SEAL is void unless attested thereby.

A JUDGMENT BASED UPON A SUMMONS NOT ATTESTED BY THE SEAL of the court is void, and a deed pursuant to a sale under execution issued upon such judgment will be canceled in equity as a cloud upon complainant's title.

Thompson and Maddox, for the appellant.

F. N. and S. H. McIntire, for the respondents.

[130] PEMBERTON, C. J. This is a suit to quiet title to certain mining property situated in Meagher county, and described in the complaint. The appellant, who was plaintiff below, alleges in his complaint that on the sixteenth day of July, 1888, he was, and is now, seised and possessed of an estate of inheritance in and to the mining claim described therein; that the respondents, [131] who were defendants below, are tenants in common with him in and to said property, but dispute appellant's title to the same; that on the seventeenth day of July, 1888, the appellant was indebted to one Jere Sullivan in the sum of two hundred and eight dollars and thirty-two cents; that on said last-mentioned day the said Sullivan commenced suit against him to recover judgment for such indebtedness in the district court of the then fourth judicial district of the territory of Montana, in and for Choteau county, and that on said last-mentioned day the said Sullivan procured to be issued, under the hand of the clerk of said court, a certain paper, purporting to require this appellant to appear and answer said complaint; that said paper or pretended summons did not contain or bear in any place or part thereof the seal of said district court, but, on the contrary, bore the impression of the seal of the probate court of said Choteau county; that on the twenty-first day of July, 1888, there was served upon the appellant a copy of said pretended summons in Meagher county, in the territory of Montana,

without the seal of said district court; that no summons issued out of said district court, and authenticated by the seal of said court, was ever served on the appellant; that appellant never appeared in said court at any time to answer said complaint; that said pretended summons, so served upon the appellant, was returned and filed with the clerk of said court on the twenty-fifth day of July, 1888; that thereafter, on the fifth day of November, 1888, the default of the appellant was entered in said court, and final judgment entered in said court against the appellant in said cause; that said pretended summons was the only means by which said court ever attempted to acquire jurisdiction of said appellant, and, as such, was the only basis for the judgment entered in said court against appellant in said cause; that on the fourth day of June, 1889, an execution issued out of the district court upon said pretended judgment, directed to the sheriff of Meagher county, who levied the same on the property of the appellant (described in the complaint herein), and on the fifth day of July, 1889, said sheriff sold said property to satisfy said pretended execution; that Timothy E. Collins *et al.* purchased said property at said pretended sale; that thereafter said Collins and others transferred their certificate of purchase of said property to the respondents, and that [122] on the thirteenth day of January, 1890, the said sheriff executed and delivered a sheriff's deed to said property to the respondents, which deed was duly recorded in the office of the recorder of said county of Meagher; that said property was sold for the sum of seven hundred and twenty-two dollars and eighty-six cents, but was of a much greater value, to wit, of the value of thirty thousand dollars; that said respondents, at the time of receiving the certificate of purchase and the deed to said property, were well acquainted with the defects and infirmities of the said pretended summons and judgment issued and rendered in said district court upon and against the appellant, and purchased the same with full knowledge of all the defects in relation thereto; that said respondents claim title in fee to the mining ground mentioned in the complaint, under and by virtue of said certificate of purchase and sheriff's deed thereto; and that said deed is a cloud upon the title of appellant, to the injury and damage of appellant in the free use and employment thereof. Appellant asks that said deed be declared void, and that it be canceled. To this complaint the respondents filed a general demurrer, which was sustained

by the court, and judgment was rendered for the respondents for costs. From this judgment the appellant prosecutes this appeal.

The appellant insists that the summons issued out of the district court of the fourth judicial district of the territory of Montana, in and for Choteau county, on the seventeenth day of June, 1888, in the suit of Jere Sullivan against this appellant, was absolutely void, because it was not authenticated by the seal of said court. If this contention is correct, the district court never acquired jurisdiction of this appellant, who was defendant in that suit, by the issuance and service of such summons; and any judgment said court may have entered in said cause, as well as the execution issued for the enforcement of such judgment, and all other proceedings thereunder, including the levy thereof on the property of appellant, and the sale and execution and delivery of the sheriff's deed complained of, would necessarily be null and void. The complaint states that the said summons bore the impress of the seal of the probate court of Choteau county, instead of the seal of the district court, at the time of its issuance and service. For the purposes [133] of this cause we shall treat the summons as having been issued without a seal.

At common law, a writ issuing from a court having a seal, in order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued. The laws of this state provide that the district courts shall have a seal (Code Civ. Proc., sec. 527), and that the clerk of the court shall keep the seal (Code Civ. Proc., sec. 528). And section 68 of the Code of Civil Procedure requires that the summons must be issued under the seal of the court. So that, under our statutes, there is no departure from the common-law rule requiring such writs to be authenticated by the seal of the court from which they issue. The appellant has cited a number of authorities holding the common-law doctrine that such writs must be authenticated by the seal of the court from which they are issued in order to give them validity, and without which they would be void. The principal case relied upon by appellant in support of his contention that the summons under discussion was void for want of the seal of the court is *Insurance Co.* v. *Hallock*, 6 Wall. 556. This case went to the supreme court of the United States, from Indiana, and involved the validity of a deed executed and delivered by a sheriff to real estate, under an order of sale,

under a statute of that state. The statute required the order of sale to be issued under the seal of the court. The seal was omitted from the order of sale. In delivering the opinion of the court Mr. Justice Miller says: "If the paper here called an 'order of sale' is to be treated as a writ of execution or *fieri facias* issued to the sheriff, or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land. The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one. We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. We have held that a bill of exceptions must be under the seal [184] of the judge." This was a collateral attack made upon the deed executed by the sheriff, under the order of sale from which the seal had been omitted. Counsel for the respondents contend that the case just cited is not controlling, and claim that the Indiana courts have declined to follow the rule therein asserted, and cite a number of Indiana cases in support of their position. From an examination of the Indiana cases cited by respondents, we are of opinion that the departure from the rule asserted in *Insurance Co.* v. *Hallock*, 6 Wall. 556, has been occasioned by the legislation in Indiana since the decision in 6 Wall. 556. In support of this view, we quote from *State* v. *Davis*, 73 Ind. 360, this case being cited by respondents. In this case the court say: "It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued: *Williams* v. *Vanmeter*, 19 Ill. 293; *State* v. *Flemming*, 66 Me. 142; 22 Am. Rep. 552; *Wheaton* v. *Thompson*, 20 Minn. 196; *Reeder* v. *Murray*, 3 Ark. 450." The case of *Insurance Co.* v. *Hallock*, 6 Wall. 556, does decide that an order of sale issued by a court of this state was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes: *Jones* v. *Frost*, 42 Ind. 543; *Hinton* v. *Brown*, 1 Blackf. 429; *Saw-*

ford v. *Sinton*, 34 Ind. 539. The older cases did hold that a writ lacking the seal of the court was absolutely void; but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void, but merely voidable. Our court long since held that such a writ was not void. It is true, as argued by appellees, that a summons so clearly defective as to be insufficient to confer jurisdiction cannot, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing cannot be amended. The liberal provisions of our statute respecting the summons would take such writs from under the old common-law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the code upon this subject are [185] contained in article 4, and the provision which directly bears upon this point is found in section 87, and is as follows: 'No summons or the service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court.'" It must appear as conclusive that the court in this case would have held the summons void but for the statute of Indiana, quoted in their opinion. This case seems to us to be strong authority for holding that, but for the statute of Indiana in relation to the essentials of a summons, that court would have held to the doctrine contained in 6 Wall. 556, to wit, that such writs, without the seal of the court from which they issued, are void.

Counsel for the respondents have cited many authorities to the effect that defective process cannot be attacked in a collateral proceeding, and to the effect that defective process is amendable in many states. But this is not a collateral proceeding. It is a direct proceeding to have a deed canceled, which is not void on its face, but which is alleged to be void because of its being the result of a judgment void for want of jurisdiction of the court rendering it, and which deed is a cloud upon the title of the party seeking relief: See 3 Pomeroy's Equity Jurisprudence, sec. 1395, *et seq.*

The appellant further contends that, at the time of the issuance and service of the summons under discussion, Montana was one of the territories of the United States, and for this reason the opinion of the supreme court of the United States

in 6 Wall. 556 is decisive of the question as to the validity of said summons, and controlling upon this court in the determination of this question; and relies upon the authority and reasoning in *Sullivan* v. *City of Helena*, 10 Mont. 134. We are of opinion that this position is unassailable, our statute being, in effect, the same as that of Indiana at the time of the rendition of the opinion in 6 Wall. 556. This reasoning and holding do not in our opinion contravene section 119 of our Code of Civil Procedure, which provides that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason [136] of such error or defect." This section presupposes an action pending, of which the court has acquired proper jurisdiction, and we are not passing upon the powers of the court under such circumstances. We hold in the case at bar that the summons—the jurisdictional writ—under the law and decisions in force and controlling in this jurisdiction at the time of its issuance was void, because not issued under the seal of the court. If this case involved a defective process, issued subsequent to summons, and the acquiring of jurisdiction by the court thereunder, then the contention of respondents that such defect or irregularity could be amended or disregarded might be urged with great force.

Judgment reversed, and cause remanded, with directions to overrule the demurrer.

HARWOOD, J., and DE WITT, J., concurred.

JURISDICTIONAL DEFECTS IN SUMMONSES AND LIKE PROCESS.—In the principal case it appeared that a party, knowing himself to be indebted, was personally served with process purporting to be issued in a suit commenced by his creditor for the recovery of the debt, and perfect in every respect except that the clerk of the court made a mistake in impressing upon the summons the seal of another court of which he was also the clerk; that the seal so impressed was in fact the seal of a probate court having jurisdiction only of the estates of deceased persons, and therefore it was apparent from an inspection of the writ that a wrong seal had been impressed thereon; that the debtor paid no attention to the writ served upon him, and permitted judgment by default to be entered against him, and an execution sale thereunder to take place in which his property was purchased by one not a party to the original action, and the time for redemption having expired, that a deed was issued to such purchaser, and that the appellate court in a suit to quiet title adjudged all these proceedings to be absolutely void. While we know of no authority directly supporting this decision and believe that none can be produced, yet it may be said to be supported by authorities deal-

ing with another class of writs, and therefore not to be denounced as entirely without support. Even had there been authorities elsewhere declaring jurisdictional process to be utterly void on account of a clerical omission to attest it with the proper seal, yet as the court of Montana was at liberty to consider the question as a new one in that state and to determine it upon principle as well as upon authority, the fact that it sacrificed substance to form cannot "but make the judicious grieve." Such decisions subject judicial tribunals and their administration of justice to just opprobrium, and even a professional man, familiar with the technicalities of the law, cannot but sympathize with the feelings of contempt generated in the mind of a layman when he sees courts overlooking the substance and equity of proceedings and determining the rights of parties upon such formal and puerile considerations as an error of a clerical officer in picking up the wrong seal and impressing it upon the process of the court.

The decision of the principal case was founded upon *Insurance Co.* v. *Hallock*, 6 Wall. 556, a case in which jurisdictional process was not at all involved. That case did unquestionably decide that an execution or order of sale, not attested by the seal of the court, was void, and that a sale thereunder did not transfer title, and there are many other decisions to the same effect: *Boal* v. *King*, 6 Ohio, 11; *Porter* v. *Haskell*, 11 Me. 177; *Swett* v. *Patrick*, 11 Me. 179; *Hutchins* v. *Edson*, 1 N. H. 139; *Shackleford* v. *McRea*, 3 Hawks. 226; *Seawell* v. *Bank of Cape Fear*, 3 Dev. 279; 22 Am. Dec. 722; *Taylor* v. *Taylor*, 83 N. C. 116; *Roseman* v. *Miller*, 84 Ill. 297; *Bybee* v. *Ashby*, 2 Gilm. 151; 43 Am. Dec. 47. Even respecting writs of this character, the weight of authority declares them to be voidable merely, and permits their amendment in support of proceedings taken under them in good faith: *Bridewell* v. *Mooney*, 25 Ark. 524; *Dever* v. *Akin*, 40 Ga. 429; *Rose* v. *Ingram*, 98 Ind. 276; *Hunter* v. *Burnsville T. Co.*, 56 Ind. 213; *Warmoth* v. *Dryden*, 125 Ind. 355; *Arnold* v. *Nye*, 23 Mich. 286; *Taylor* v. *Courtnay*, 15 Neb. 190; *Corwith* v. *State Bank*, 18 Wis. 560; 86 Am. Dec. 793; *Purcell* v. *McFarland*, 1 Ired. 34; 35 Am. Dec. 734; *Dominick* v. *Backer*, 3 Barb. 17; *People* v. *Dunning*, 1 Wend. 16.

The object of a summons is to inform the defendant that an action or other proceeding has been commmenced against him in a court therein named, and to warn him that, unless he appears and makes some defense within a time designated, he will be regarded as confessing the allegations of the complaint, and as authorizing the court to enter against him any judgment prayed for therein and sustained thereby. Furthermore, when the court proceeds to enter judgment upon process which appears to have been served upon the defendant, it may properly be regarded as adjudging such process and service to be sufficient, and when the process and its service are acquiesced in by the defendant and impliedly adjudged sufficient by the court, third persons, and even the plaintfff, should be entitled to regard any formal defects therein as waived. It is very remarkable that the precise question of the effect of the omission of a seal from jurisdictional process has so rarely been considered by the courts, except, upon appeal, upon motions to quash such process or by pleas in abatement. When presented by such a motion or plea, it has been held that the plaintiff cannot avoid the difficulty by a counter-motion to amend the process, and that the writ must be set aside: *Tibbetts* v. *Shaw*, 19 Me. 204; *Witherel* v. *Randall*, 30 Me. 168; *Hall* v. *Jones*, 9 Pick. 446. So, though no motion is made to quash the process, if the defendant has not otherwise waived the defect, he may appeal from a judgment entered against him by default and thereby obtain its reversal: *Wood-*

ford v. *Dugan*, 2 Ark. 31; 35 Am. Dec. 52; *Frosch* v. *Schlumpf*, 2 Tex. 422; 47 Am. Dec. 655; *Stayton* v. *Newcomer*, 1 Eng. 451; 44 Am. Dec. 524; *Garland* v. *Britton*, 12 Ill. 232; 52 Am. Dec. 487. None of these decisions, however, involve the question of what is the effect when the defendant does not avail himself of his remedy by motion, plea, or appeal, and, as in the principal case, in effect defies the plaintiff and the court, and even waits until the debt against him has been paid by a sale under the irregular and erroneous judgment. In Indiana the decisions holding a summons not attested by the seal of the court to be sufficient to support a judgment: *Boyd* v. *Fitch*, 71 Ind. 306; *State* v. *Davis*, 73 Ind. 359, were influenced by the statute of that state declaring that such summons should not be set aside nor adjudged to be insufficient when there is sufficient substance to inform the party on whom it is served that there is an action instituted against him in court. In the case of *Brewer* v. *Sibley*, 13 Met. 175, a writ of review was prosecuted, and the objection was made as in the principal case, that the original writ bore the seal of the wrong court. The court in respect to this matter, however, said: "The omission to affix a proper seal to a writ issuing from this court is such error as will abate the writ, if the objection be properly taken. But such objection must be taken at the first term of the appearance of the defendant. Although a seal is one of the requisites of a proper writ, yet the want of it will furnish no cause for a motion in arrest of judgment. It is a mere defect in form which, if relied upon, must be taken in due season; and if not thus taken, the exemption is waived. Assuming that objections of form were open to the defendant upon a writ of review, the present objection ought to have been taken at the return term of the writ of review, and not postponed to the third term. Taking the case in the most favorable view for the defendant, we think his motion to dismiss for want of a proper seal ought not to have been allowed." An analogous question was presented to the supreme court of Missouri in the case of *Jump* v. *Batton's Creditors*, 35 Mo. 193, 86 Am. Dec. 146, in which it appeared that a seal had been omitted from a writ of attachment, and that a motion was made to quash such writ on account of that omission, and upon this subject the court said: "The statute requires all writs and process to be under the seal of the court from which they issue, but it nowhere declares the absence of the seal shall render the process void. The only office of the seal is to authenticate or to prove the genuineness of the writ to which it is attached. It is held in Massachusetts that the want of the seal is merely formal, and affects the regularity of the process only: *Foot* v. *Knowles*, 4 Met. 391; *Brewer* v. *Sibley*, 13 Met. 175. And in New York it is settled that a writ without the seal of the court is not void, and therefore amendable: *People* v. *Dunning*, 1 Wend. 17; *Jackson ex dem. Culver* v. *Brown*, 4 Cow. 550. The writ was amendable, and the court therefore committed no error in permitting the respondent to amend by affixing the seal pending the motion to quash, and in refusing to quash."

The provision quoted from the statutes of Indiana, rendering immaterial defects in the form of process not calculated to mislead the defendant, has been substantially enacted in other states. Thus, in New Hampshire the statute declares "no writ, declaration, return, process, judgment, or other proceeding in the courts or course of justice shall be abated, quashed, or reversed, for any error or mistake, where the person or cause may be rightfully understood by the court": *Garvin* v. *Legery*, 61 N. H. 153, 155. These statutes, so far as they relate to judicial writs are, in our judgment, but declaratory of the law otherwise existing upon the subject. In many of the

states their statutes declare what the summons or other writs designed to bring the defendant into court shall contain, and sometimes these statutory provisions have been deemed mandatory, and judgments declared void for noncompliance therewith. Thus in Colorado a summons was adjudged to be fatally defective, and the judgment based thereon void, because of the omission to state in such summons, as required by that statute, the cause and general nature of the action, and because it notified defendant that judgment would be taken against him for a sum designated, when it should have informed him that plaintiff would apply to the court for the relief demanded in the complaint: *Atchison etc. Ry.* v. *Nicholls*, 8 Col. 183. But, even in that state, it is conceded that a literal compliance with the statute is not necessary, and the omission of some of the words which it directs the summons to contain, not fatal to the judgment: *Kimball* v. *Castaynio*, 8 Col. 525. So in Illinois it has been held that a summons returnable at a term other than that at which it was authorized by law to be made returnable is absolutely void, and will not support a judgment founded thereon: *Culver* v. *Phelps*, 1 0 Ill. 217. And in Tennessee and Michigan it has likewise been declared that a writ which did not run in the name of the people of the state was, in contemplation of law, a nullity: *McLendon* v. *State*, 92 Tenn. 520; *Forbes* v. *Darling*, 94 Mich. 621. The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that he must appear within the time and at the place named, and make such defense as he has, and in default of his so doing that judgment against him will be applied for or taken in a sum designated, or for the relief specified. If the summons actually issued accomplished these purposes it should be held sufficient to confer jurisdiction, though it may be irregular in not containing other statements required by the statute. If, on the other hand, it is wanting in these essential particulars, it will generally fail to give the court jurisdiction: *Pickering* v. *State*, 106 Ind. 228. In Iowa a judgment was held void because the name of the plaintiff as shown in the summons was Pike, when in fact and according to the complaint it was Rike; and in Idaho a like conclusion was announced because defendants were named in the alternative as A, B, C, or D: *Alexander* v. *Leland*, 1 Idaho, N. S. 425. The general rule is, that if process is amendable it is not void, and will support a judgment: *Baker* v. *Thompson*, 75 Ga. 164, unless it is not sufficient to warn defendant of the action against him, and when and before what court he must make defense: *Kitsmiller* v. *Kitchen*, 24 Iowa, 163. Therefore a judgment will, when collaterally attacked, be supported by process, though it contains a statement that plaintiff will take judgment for a sum named, when the statute required it to state that the plaintiff will apply to the court for the relief demanded in the complaint: *Keybers* v. *McComber*, 67 Cal. 395; *Chamberlain* v. *Bittersohn*, 48 Fed. Rep. 42. Or directs defendants "to appear on the first Monday, 1877, of the next term of the court to be held at Carthage," when the court referred to held terms at the place designated the time of commencement of which was fixed by law: *Jasper County* v. *Wadlow*, 82 Mo. 172. Or declared that plaintiff would apply to the court for the relief demanded in the complaint, when it should have stated that plaintiff will take judgment for a sum specified in the summons: *Miller* v. *Zeigler*, 3 Utah, 17, or did not show where the defendant should appear: *Hollingsworth* v. *State*, 111 Ind. 289. In an action to foreclose a lien, if the summons refers to a petition on file, the fact that it does not state that a money judgment is sought is not fatal to such judgment: *Blair* v. *Wolf*, 72 Iowa, 246; *York* v. *Bourd-*

man, 40 Iowa, 57. Where the statute provides that a part of the service of summons shall consist of leaving with the defendant a copy of the complaint, it is manifest that, at least for the purpose of furnishing him with necessary information, the summons may supplement the complaint, and render immaterial defects therein: *Higley* v. *Pollock*, 21 Nev. 198. As to formal defects, such as the omission or variation of the style of the process or in the attestation of the writ, the best considered cases affirm that the omissions or variations are mere irregularities to be taken advantage of either by motion to quash the process, or by appeal, or plea in abatement, and that if not so taken advantage of the judgment cannot be attacked collaterally, and must be treated as valid: *United States* v. *Turner*, 50 Fed. Rep. 734; *Guarantee Trust etc. Co.* v. *Buddington*, 23 Fla. 514; *Weiskoph* v. *Dible*, 18 Fla. 22; *Gilmer* v. *Bird*, 15 Fla. 410; *Parsons* v. *Swett*, 32 N. H. 87; 64 Am. Dec. 352. For this reason the fact that a summons was directed to the defendant instead of to any lawful constable of the county, as the statute required, and its failure to state the names of the parties on its face where they appeared elsewhere, was regarded as a mere irregularity, and the summons as sufficient to support a judgment entered thereon: *Telford* v. *Coggins*, 76 Ga. 683.

PALMER *v.* MCMASTER.

[13 MONTANA, 184.]

JUDGMENT UPON CONSTRUCTIVE SERVICE OF PROCESS based on an affidavit to procure the service of summons by publication which states "that the defendant has departed from this state and cannot be found therein," is insufficient to support a judgment based thereon, and such judgment is absolutely void. It is essential that the affidavit should state probative facts from which the court may draw the conclusion that due diligence has been used to ascertain the whereabouts of the defendant and that he cannot be found within the state.

Brantley and Scharnikow, and W. H. Trippett, for the appellant.

Cole and Whitehill, for the respondent.

187 PEMBERTON, C. J. This case has been several times before this court on appeal (8 Mont. 186, and 10 Mont. 390), and the errors assigned in the record on this appeal have nearly or quite all been passed upon in the former appeals of the case. It is a case for damages for the conversion of certain personal property, described in the complaint of respondent, who was plaintiff in the court below. The appellant, the defendant below, was, at the time of the conversion complained of, sheriff of Deer Lodge county, and, among other defenses set up in his answer, sought to justify the seizure of the property claimed to have been converted under an execution in his hands, issued out of the court below, upon a judg-

ment rendered in said court against one William J. Palmer, husband of the respondent.

The action against the said William J. Palmer was commenced by publication of summons. The affidavit on which the order of publication of summons was made by the court below is as follows: "James M. Bailey being duly sworn, says on oath he is the plaintiff above named. That the above-entitled cause has been begun, and summons has been issued thereon, and is now pending in said court. That said defendant has departed from this territory, and cannot be found therein. That plaintiff has a good and subsisting cause of action against the defendant in this: that said defendant is indebted to plaintiff as follows: That on the 10th day of March, 1880, defendant executed to plaintiff and one Hartwell his promissory note for $113, payable six months from date, with 1½ per cent per month interest, which defendant has failed to pay, and said note was assigned to plaintiff. And for second cause of action [illegible] said plaintiff sold to defendant in May, 1883, 8,265 pounds of oats, which defendant agreed to pay plaintiff therefor the sum of three cents per pound—$247.95. And plaintiff sold to defendant two horses, of the value of $200, which defendant agreed to pay plaintiff; all of which more fully appears by plaintiff's complaint on file in said cause. James M. Bailey."

The suit of James M. Bailey *versus* William J. Palmer was prosecuted to judgment. In the trial of the case at bar below, the appellant offered in evidence, in justification of his seizure of the property converted, the judgment in the case of *Bailey* v. *Palmer*. The court excluded the evidence on the ground that the affidavit for an order of publication of summons, quoted above, was not sufficient to authorize or support such order of publication, and that the judgment rendered thereon in favor of Bailey was void. This ruling of the court is the principal error assigned in this case.

This court held in *Palmer* v. *McMaster*, 8 Mont. 186, and *Alderson* v. *Marshall*, 7 Mont. 288, that a proper and sufficient affidavit for an order of publication in cases of constructive service of summons is a prerequisite to a valid judgment. The question before this court is as to the sufficiency of this affidavit. It is the settled doctrine "that the statutory provisions for acquiring jurisdiction of a defendant by the publication of the summons in the stead of a personal service must be strictly and exactly" complied with by stating in

the affidavit for the order of publication the probatory facts by which the ultimate facts which the statute calls for are shown: 1 Black on Judgments, sec. 232.

In *Ricketson* v. *Richardson*, 26 Cal. 149, the court says: "An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the facts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered." In *Forbes* v. *Hyde*, 31 Cal. 342, *Ricketson* v. *Richardson* is affirmed in an elaborate opinion by Mr. Justice Sawyer.

In *McCracken* v. *Flanagan*, 127 N. Y. 493, 24 Am. St. Rep. 481, this question is elaborately discussed, and authorities cited. In this case the court says: "It is, from an examination of this statute, pretty evident that some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and that the simple averments in the affidavit that the defendant is a nonresident, and cannot be found within the state, are not alone sufficient to support an order for the service of a summons by publication. Those facts do not

imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that, the defendant cannot be found in the state, does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence. Hence, the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state": See [190] also *Galpin* v. *Page*, 3 Saw. 93; *Braly* v. *Seaman*, 30 Cal. 611; *Belcher* v. *Chambers*, 53 Cal. 637; *Alderson* v. *Marshall*, 7 Mont. 288; *Palmer* v. *McMaster*, 8 Mont. 186.

The affidavit in the case at bar does not state that due or any diligence had been used to ascertain the whereabouts of the defendant, or that any effort had been made to obtain personal service of summons upon him. His residence is not stated, nor any reason given for not stating it. There is not a probatory fact stated in the affidavit. It is an attempt to state the words of the statute, without stating any probatory facts that would enable the court to judicially determine whether or not it was sufficient to authorize the issuance of the order for the publication of summons. In view of the authorities quoted and cited above, we are of the opinion that the affidavit in question was insufficient in law to support an order of publication of summons, and that the judgment of *Bailey* v. *Palmer* was consequently null and void, and was properly excluded as evidence in this case by the court below.

The judgment of the court below is affirmed.

HARWOOD, J., concurs. DE WITT, J., having been of counsel, did not sit.

PROCESS—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION OF SUMMONS.—The simple averments in an affidavit for an order of publication of summons, that defendant is a nonresident of, and cannot be found within, the state are not alone sufficient to support an order for the service of a summons by publication, but such affidavit must show that due diligence to find the defendant has been exercised: *McCracken* v. *Flanagan*, 127 N. Y. 493; 24 Am. St. Rep. 481, and note. But see *Taylor* v. *Coats*, 32 N. H. 20; 29 Am. St. Rep. 426.

HOPKINS *v.* BUTTE AND MONTANA COMMERCIAL COMPANY.

[18 MONTANA, 223.]

WATERCOURSES, DAMAGES FOR OBSTRUCTING BY LOGS.—One who uses a stream for the purpose of floating logs is not answerable to a riparian proprietor for the jamming of logs together so as to form a gorge, retarding the flow of water, and submerging the plaintiff's lands, unless it appears that the defendant was guilty of a want of ordinary care and prudence in the conduct of his business, and that the damage to plaintiff was suffered because of such lack of care.

Arthur J. Shores, for the appellant.

Leslie and Downing, for the respondent.

223 PEMBERTON, C. J. The respondent, who was plaintiff below, alleges in his complaint that he is the owner of a ranch in Cascade county, and engaged thereon in raising grass, wheat, oats, vegetables, etc.; that a certain stream, known as Deep creek, flows through his said ranch; that in the month of July, 1891, the appellant (defendant below) was engaged in floating logs down said stream to its mills, located at the city of Great Falls; that the appellant had theretofore erected large dams or reservoirs on said stream, above the lands of respondent, for the accumulation of water to assist in floating said logs when the water was low in said stream; that appellant 224 had cut and placed in said stream above the lands of respondent a large quantity of logs to be floated down said stream to its mills; that said logs had formed a jam or boom in said stream that obstructed the natural flow of the water therein, and backing up the water in large quantities above the lands of respondent, so that the jam, gorge, or boom, was suddenly released, and caused said stream to swell and overflow its banks, submerging respondent's lands, and by means thereof caused quantities of muddy water, logs, rafts, rubbish, and dirt to flow over and upon respondent's lands, damaging the lands, crops, fences, etc., of respondent.

The second count in the complaint charges substantially the same facts as above, and in addition thereto, after alleging that said logs formed a jam, etc., in said stream above respondent's lands, alleges that "the defendant (appellant) wrongfully, through its agents and servants, suddenly released said water, which caused said stream to rise above the level thereof, and that by reason thereof plaintiff's (respondent's)

land was submerged," etc, and by reason thereof respondent was damaged.

The appellant filed a general demurrer to the complaint, which was overruled by the court, and appellant excepted. Answer and replication were filed, the answer denying all the allegations of the complaint. The cause was tried to a jury, and verdict and judgment rendered for respondent.

Appellant filed its motion for new trial, which was overruled. Whereupon appellant appealed from the order overruling motion for new trial, and from the judgment of the court below.

On the trial of the case counsel for appellant requested the court to give the jury the following instruction: "The plaintiff's action is based on the alleged negligence of the defendant in the conduct of its business upon Deep creek. There is no presumption that it was unlawful for defendant to float logs down this steam, and the plaintiff can recover of defendant in this action only by showing that it was guilty of a want of ordinary care and prudence in the conduct of its business upon this stream, and that the plaintiff has sustained damage because of such lack of care." The court refused this request, and instructed the jury as follows: "There is no presumption that it [225] was unlawful for defendant to float logs down this stream. The defendant had the right to use such stream for such purpose, and they were engaged in a legitimate business, but while engaged in such business the defendant was obliged to conduct its business in such manner as not to cause injury to the plaintiff. And if you believe from the evidence that in July, 1891, the defendant had placed in Deep creek above the lands of the plaintiff a large quantity of logs to be floated down said stream to their mill, which had jammed together, forming a gorge, and such jam obstructed and retarded the natural flow of said stream in large quantities, so that such jams and gorges were suddenly released, causing said stream to swell and raise above the level thereof, thereby submerging plaintiff's land with water, and thereby caused large quantities of water, logs, and rubbish to flow over said plaintiff's land, and his growing crops were destroyed by reason thereof, you will find for the plaintiff in whatever damages you may believe from the evidence he has sustained."

The action of the trial court in refusing the request of appellant and in giving the instruction quoted above is the principal error assigned in the record.

The gist of this action is negligence; and until some negligence is shown there can not be said to be any liability: *Bielenberg* v. *Montana Union Ry. Co.*, 8 Mont 271.

We think the instruction requested by appellant correctly stated the law of the case, and should have been given: *Carter* v. *Thurston*, 58 N. H. 104; 42 Am. Rep. 584; *Field* v. *Apple River L. D. Co.*, 67 Wis. 569. The instruction given by the court practically ignored the question of negligence, and told the jury to find for the respondent for whatever damages he had sustained by the acts of the appellant in placing the logs in said stream, whether the appellant was guilty or not of any negligence or want of care in the conduct of its business, or whether the damage resulted from causes beyond appellant's control, and this, too, after instructing the jury that the appellant had a right to place its logs in said stream, and that it was engaged in a legitimate business. Ordinarily, if a person is engaged in a legitimate business, he is only liable to another for such injuries as result from negligence or the want of [226] ordinary care and prudence in the conduct and management thereof. Tested by this rule, we think the instruction given by the court below did not correctly state the law governing the case.

There are other errors assigned, but we do not deem it necessary to consider them.

The order of the court below denying a new trial is overruled, the judgment reversed, and the cause remanded for new trial.

HARWOOD, J., and DE WITT, J., concur.

WATERCOURSES—RIGHT TO FLOAT LOGS.—One has a right to use a public stream in a proper and reasonable manner to float his logs, and if they strand on the land of a riparian owner he is not liable for any injury thereby to the land unless negligent: *Carter* v. *Thurston*, 58 N. H. 104; 42 Am. Rep. 584; *Davis* v. *Winslow*, 51 Me. 264; 81 Am. Dec. 573, and extended note; and a mere jam of logs in a river does not of itself constitute negligence on the part of the booming company running logs in such river: *Witheral* v. *Muskegon Booming Co.*, 68 Mich. 48; 13 Am. St. Rep. 325, and note. In the absence of prescription or user it is not a public right to float logs down a non-navigable stream which is only fit for that purpose during periodical freshets. The bed and banks of such a stream are under the absolute ownership and control of the riparian owner: *Hubbard* v. *Bell*, 54 Ill. 110; 5 Am. Rep. 98, and note.

BONNER v. MINNIER.

[13 MONTANA, 269.]

A HOMESTEAD IS NOT EXEMPT FROM A LIEN IN FAVOR OF A MATERIAL-MAN who furnished materials to be used in the improvement thereof and can, therefore, be directed to be sold in satisfaction of such lien.

Brantley and Scharnikow, for the appellant.

W. H. Trippett, for the respondent.

269 HARWOOD, J. This action was brought to obtain judgment, and foreclose a lien to enforce payment, for materials furnished and used in the construction of a certain house in the village of Champion, Deer Lodge county. It appears that said house was built upon a piece of land theretofore vacant, being part of a quartz lode mining claim, purchased by defendant Minnier from one Baudet, which purchase was originally evidenced by a bill of sale 270 executed by Baudet to Minnier. But it appears to be conceded that the money used in said purchase belonged to defendant Mrs. Minnier; that, while the title to the property stood in that condition, the defendant Minnier, with the knowledge and approval of his wife, commenced the erection of a house on said land, and purchased from plaintiff, and used in said structure, certain lumber and other materials; that, to secure payment for said building material, plaintiff filed his account thereof, and notice of lien on said property, as provided by law; that, some time after the commencement of the construction of said house, a formal conveyance of said premises was made by said original owner, Baudet, and defendant Minnier, to his wife, Mrs. Minnier. Said house appears to have been constructed and arranged so as to be used for residence purposes, or as a place of business, or for both such purposes; that, as soon as the house was sufficiently constructed to admit of habitation, defendant and his wife moved therein, and occupied the same continuously as their home, and Mrs. Minnier also fitted up and operated a barber's-shop in one room of said house; that defendants own no other real property as a homestead or otherwise; that defendants failed to pay for said building materials, wherefore this action was brought to foreclose said lien, and subject said premises to sale to enforce such payment. There was no controversy raised in the action as to the furnishing of said building materials by plaintiff, or the use thereof by

defendants in the erection of said building, and the nonpayment therefor, as alleged.

The only defense set up was that defendants claimed said premises as their homestead, and that the same, being a homestead, was not subject to a lien for said building materials so purchased and used in the improvement thereof. There was some controversy in the case as to whether said premises constituted the home of defendants at the time said materials were furnished and used in the improvement thereof; but the trial court sustained the contention of defendants that said premises constituted their homestead, and the court further held that the statutes of this state exempt homesteads from the charge of a lien for building materials procured and used in the erection of improvements thereon, and judgment was rendered accordingly, [271] from which judgment, and an order overruling plaintiff's motion for a new trial, this appeal was prosecuted.

[274] We think under the facts shown in this case the premises in question were properly held to constitute defendant's homestead.

The important question of law involved in this appeal is whether a homestead is exempt from foreclosure and sale to satisfy a lien created by law in favor of one who furnishes materials purchased and used by the owners of such homestead in the improvement thereof. It is not disputed that by the provisions of chapter 82, page 1028, of the Compiled Statutes of this state, a lien is expressly created in favor of parties furnishing materials contracted for and used by the owners of land in making improvements thereon, without any exception in favor of homestead premises. But it is contended by respondents that, notwithstanding the provisions of that statute, the statute providing exemption of homesteads and other property from forced sale on execution (Code Civ. Proc., secs. 321–330) [275] withholds the homestead from the operation of such lien if it accrued for material alone, furnished and used in the improvement of the homestead.

To maintain this proposition, respondents rely on a strict and very narrow interpretation and application of the clause of section 323 of the Code of Civil Procedure, which provides that "such exemption shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon lawfully obtained." It is argued that this provision is not broad enough to include the lien declared by statute in favor of one who simply fur-

nishes materials used in the improvement of a homestead; and that, consequently, the plaintiff, who furnished material only, which was procured and used by defendants in the improvement of their homestead, is barred of relief, by way of enforcement of said lien.

In the case of *Merrigan* v. *English*, 9 Mont. 113, the court refused to so construe and apply the provisions of the exemption statute just cited as to deny the enforcement of a lien on a homestead for material furnished—namely, a mantel—in favor of the mechanic who furnished the same, as well as the labor involved in setting said mantel in the building. The only real difference between that case and the one at bar appears to be that, in the former case, the lien claimant occupied the position of furnisher of material, as well as labor, on the premises, in shaping the material so furnished into the building; whereas, in the case at bar, the lien claimant furnished and delivered material, without any labor towards the erection of the building on the premises. If the view urged by respondents is adopted the effect of such holding would appear to be that one who manufactured, hauled, and delivered the brick, or quarried, cut, hauled, and delivered the stone, or went into the forest, cut, manufactured, transported, and delivered the lumber contracted for, and used in the erection of improvements on a homestead, would be denied enforcement of the lien which the law declares he shall have to secure payment for such materials, because he would be simply the furnisher of material for the structure, like the plaintiff, and would, according to such construction and application of the exemption statute, not be included within the meaning and intent of the legislature in [276] declaring that such exemptions shall not affect the liens of laborers and mechanics. We do not think such a view gives effect to the intent of the legislature, as manifest in these statutes. Even without any further expression of the legislative intent on this point than the clause of section 323 above referred to, we could not adopt the view urged by respondents as giving effect to the intent of the law. We are satisfied that, in providing that such exemptions shall not affect any laborers' or mechanics' liens, the legislature referred to the liens for material and labor provided for by the statutes of this state commonly mentioned as the "Mechanic's Lien Law." Such improvements, in fact, comprise labor bestowed upon material, both on and off the premises where the improvement is placed.

Payment for the material is payment for the labor expended upon it through all the changes it has undergone, from its natural raw state, until placed in the structure.

But if, in looking at section 323 of the exemption statute alone, there is room to raise doubts as to the intent of the legislature, and room for contention that a homestead claimant may obtain material for improvement on his homestead, and enjoy the same without payment, in case no property can be found over and above the exemption, there is still another provision in the same statute which seems to give further light as to the intention of the legislature on the point under consideration, namely, a provision of section 328, wherein it is declared "that this act shall not be construed as to in any manner relate to judgments or decrees rendered on the foreclosure of mortgages, either equitable or legal." The lien under consideration is a specific encumbrance, existing through a positive enactment of the legislature, operating upon certain facts, and the lienor would seem to be entitled to his judgment of foreclosure, on showing the facts and a compliance with the statute, the same as a party, on making out his case, is entitled to judgment for debt, although the debtor may not have property subject to an ordinary execution. Now, when it comes to the execution of these judgments, it is found that the legislature has made a distinction between them in the statute relating to exemptions, declaring, in effect, that such exemptions shall not be construed to affect judgments or decrees of foreclosure of specific encumbrances. [277] If this is not the plain intendment of the provisions of the exemption statute last-above quoted, we think it would be difficult to conceive or reasonably explain the intent those provisions manifest.

The rules of construction that several provisions of statutes relating to the same subject shall be considered and construed together, so that all the provisions shall be given reasonable force and effect, if possible (Code Civ. Proc., sec. 631), and that, "when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted" (Code Civ. Proc., sec. 638), both, we think, demand such a construction of the statutes in question as will give force and effect to appellant's lien.

Respondents cite, in support of their position, *Richards* v. *Shear*, 70 Cal. 187, wherein the court held that the homestead was not subject to sale in satisfaction of a lien for material

alone, furnished in the improvement thereof. While there is some likeness, but not entire similarity, in the provisions of the California statute and the clause of section 323 of our code above quoted, it does not appear that the California court was aided by such general proviso as we have in section 328 to show the intendment of the legislature. It has been shown that the exemption statute of Montana was not taken from California, in *Lindley* v. *Davis*, 7 Mont. 207, and *Merrigan* v. *English*, 9 Mont. 113, and considering the difference of form, as well as additional provisions we have to construe and apply, it would seem to be an abdication of reason to follow the holding in the California case just cited. It should be further observed that in a recent case the supreme court of Nebraska placed a construction opposed to that of California on statutory provisions entirely similar: *Phelps etc. Windmill Co.* v. *Shay*, 32 Neb. 19. The holding in the case of *Duncan* v. *Batemen*, 23 Ark. 327, 79 Am. Dec. 109, cited by respondents, is based upon different statutory provisions than those prevailing in Montana. It was there held that the statute of Arkansas did not create a lien in favor of one who simply furnished material. Such might be the case. The lien depends on the statute for existence. But here it is not disputed that the statute imposes the lien in favor of appellant; and we
[378] think, without doubt, the legislature intended the homestead should be subject to a lien, and to foreclosure and sale thereunder for material obtained and used by the owners of the homestead in the improvement thereof.

Judgment is therefore reversed, and the cause remanded for proceedings in conformity with the views herein expressed.

PEMBERTON, C. J., concurs.

JUDGE DE WITT dissented from the opinion of the court. In his dissenting opinion he first considered the facts of the case for the purpose of determining whether the premises in controversy had been impressed with the characteristics of a homestead so as to come within the protection of the statutes of the state exempting homesteads from forced sale, and reached the same conclusion upon this subject as did the other members of the court. He next referred to the statutes of the state relied upon by the majority of the court, and announced his conclusion that there was nothing in them subjecting a homestead to the lien of a mere materialman, and upon this subject he said: "And this brings me to the consideration of the second point in the case. Section 323 of the Code of Civil Procedure provides that the homestead exemption shall not affect any 'laborers or mechanics' liens.' A homestead is thus not exempt from the lien of a laborer or mechanic. Appellant contends that in the exception the term 'laborer or mechanic'

is generic, and is intended to include all materialmen or lumbermen, as plaintiff is in this case. Section 1370, Compiled Statutes, gives a lien to certain classes of persons, and describes them as 'every mechanic, builder, lumberman, artisan, laborer, or other person or persons, association, or partnership or corporation, that shall do or perform any work or labor upon, or furnish any material, machinery, or fixture for, any building,' etc. This list of lienors includes mechanics and laborers, and also lumbermen, and general materialmen, as persons are called who furnish material. Section 322 of the Code of Civil Procedure exempts the homestead from forced sale on execution, or any other final process from a court. If the statute of exemptions had stopped here it is plain that all persons named in section 1370 as lienors would be deprived of any enforceable lien against a homestead. But section 323 follows, and makes an exception to the homestead exemption, and specifically names the excepted classes of persons as 'mechanics and laborers.' It does not, in terms, except all classes of lienors named in section 1370, but selects two of those classes and names them. If the intent was to let into a lien on a homestead all lienors named in section 1370 the statute would have said so. When it expressly selects two classes only, namely, laborers and mechanics, and designates them by name, and omits to name all other persons in whose company mechanics and laborers are found, in section 1370, the omission is certainly significant, and renders applicable the maxim '*expressio unius*,' etc. It is quite true that every man who furnishes materials is also, in one point of view, furnishing labor, for every finished product includes the raw material and the labor placed upon it, and, as a rule, the labor in the finished product is of much more value than the raw material. This may be observed universally. The lumberman sells boards. The greatest value in the boards is the labor placed upon them. The quarryman sells building-stones. The original cost of the material was almost nothing. The value of the finished block is almost wholly in the labor. The capitalist sells the use of money, which money represents labor. But when we deal in the wares of the lumberman, the quarryman, or the capitalist, we do not call those wares 'labor,' nor do we call the dealers in those wares 'laborers.' Therefore it does not seem to me to be the simplest and plainest construction of the statute to make the words 'laborer or mechanic' include a material furnisher, because the material supplied by the furnisher is the result of labor. I am of opinion, therefore, that the words 'mechanics and laborers' in section 323 are not generic, as appellant urges, and would not include materialmen and lumbermen. This view has been held in California: *Richards* v. *Shear*, 70 Cal. 187; *Walsh* v. *McMenomy*, 74 Cal. 356. I quote as follows from *Richards* v. *Shear*, 70 Cal. 187; 'It is said for the appellants that it was not the intent of the legislature to subject the homestead to execution or forced sale in satisfaction of judgments obtained on debts secured by liens of mechanics and laborers who perform manual labor in and about the the building, and withhold such privilege from the men who furnish material therefor. We can see great force in the suggestion of Mr. Thompson, in his work on Homesteads and Exemptions, section 312, that there is no difference in principle between a debt due to A, who has provided me with the land upon which I have erected my building, and a debt due to B, who has furnished the materials to build it, and a debt due to C, whose labor has built it. But where the legislature has undertaken to deal with the subject, and has declared from what the homestead shall be exempt, and with what it shall be charged, it only remains for the courts to give effect to its provisions. Admittedly, the language of the section of

the code in specifying in what instances the homestead shall be subject to execution and forced sa e does not include the liens of materialmen. The language is in satisfaction of judgments "on debts secured by mechanics, laborers, or vendors' liens upon the premises." The chapter of the Code of Civil Procedure which provides for liens of the nature claimed by the plaintiffs is headed "Liens of Mechanics and Others Upon Real Property," and gives to "mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class, performing labor upon or furnishing materials to be used in the construction a lien," etc.: Code Civ. Proc., sec. 1183.'

"I do not observe any marked distinction between the California statute and our own, nor can I agree that section 328 of our Code of Civil Procedure helps the contention that a pure materialman may enforce a lien against a homestead. Section 323 of the Code of Civil Procedure provides that this homestead exemption shall not affect a laboror's or mechanic's lien. I think we all concede that the enforceability of the laborer's and mechanic's lien is intended to be saved by this section, even granting that my construction of the words 'laborer' and 'mechanic' is correct, and that those terms are not generic, so as to include all materialmen.

"Now, it is further suggested that the enforceability of liens, including materialmen's (such as plaintiff herein), is saved by the proviso of section 328, which is as follows: '*Provided*, That this act shall not be construed as to in any manner relate to judgments or decrees rendered on the foreclosure of mortgages, either equitable or legal.' The construction of this proviso, as held by part of this court, makes the words, 'mortgage, either equitable or legal,' in section 328, to include materialmen's liens. I cannot satisfy myself that such inclusion was intended. A mortgage is an encumbrance placed upon property by the acts of the parties, either expressly so intended by the parties or so construed by a court of equity. On the other hand, the mechanic's, or laborer's, or materialman's lien is given by virtue of an express statute. A mortgage is given by the debtor voluntarily, either expressly or by construction of equity. A mechanic's or laborer's or materialman's lien is secured against the debtor without his consent. A mortgage has the characteristic of a lien, in that it is a security upon property. A mechanic's lien is also a a security on property, but it is not obtained by the voluntary act of the debtor. A mortgage is a lien, and something more. (1 Jones on Liens, secs. 2, 11.) I quote from those sections as follows: 'The word "lien" is here used in its legal and technical sense. Much confusion has arisen from using the word in a loose manner, at one time in its technical sense and at another in its popular sense. It is often convenient and proper to speak of the lien of a mortgage or of the lien of a pledge. Of course it will often happen, when the word is used in this sense, that the description of the lien shows that the word is used merely to denote the charge or encumbrance of a mortgage, pledge, attachment, or judgment.' Sec. 2. 'A mortgage is sometimes inaccurately called a lien. "And so it is," says Mr. Justice Story, "and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is, therefore only in a loose and general sense that it is sometimes called a

lien, and then only by way of contrast to an estate absolute and indefeasible": *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 441.' SEC. 11. 'I think that the intent of the proviso of section 328 was to treat of mortgages, as the language says, and not of the materialmen's liens, which are not mentioned in terms, and which it is not necessary to include in the word "mortgage." In this view, the proviso of section 328 looks to the saving of a security created by the act of the party, namely, a mortgage. This seems wholly just. It is right that the debtor should not be relieved from a security which he had voluntarily created. But when the statute makes this sort of a declaration I do not understand that we must also hold that, by the same language by which it retains the security of the voluntary mortgage, it also intended to retain the security of the involuntary mechanic's lien, which operates against the debtor *in invitum*, which was the creature of the statute, and not of the debtor.

"The appellant cites us to *Phelps etc. Windmill Co.* v. *Shay*, 32 Neb. 19, as holding a view contrary to that which I entertain. All that is said in that case is as follows: 'Section 3, chapter 36, Compiled Statutes, provides that "the homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. On debts secured by mechanics, laborers, or vendors' liens upon the premises; 2. On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife or an unmarried claimant." This section makes the homestead liable for a mechanic's lien.' The matter is thus disposed of by the Nebraska court in one line of the opinion. Whatever good reasons that court had for its views are not disclosed by the opinion, which, therefore, does not give me any light. The cause of action in the Nebraska case was for supplying a windmill. The counsel in the case for the lienor put their claim upon the ground that it was for both labor and material, and that only pure materialmen were excluded by the homestead exemption. That the claim was for both labor and material does not, however, appear in the statement of facts made by the court, nor in the meager expression of opinion as to the law. But if the Nebraska case was, as counsel therein argued, one for material and labor both, then the case is not in conflict with the views which I suggest; and, if the case was one for material only, all that I can say is that the case was not sufficiently reasoned out to give me any satisfaction.

"This matter was suggested in *Merrigan* v. *English*, 9 Mont. 126, and the 70 and 74 California cases were called to the attention of the court. But the court held that those cases were not in point in *Merrigan* v. *English*, and said: 'In each of the cases cited the court treated the lien as a lien for material alone. In the first case cited the lien, as a matter of fact, was for material only. We do not hold that a materialman has such a lien as will be valid against a homestead. That is not the question before us.'

"I am therefore of opinion that the district court should be sustained in its finding that the premises were a homestead, and also in its conclusion that a pure materialman or lumberman cannot enforce a lien against a homestead."

MECHANICS' LIENS ON HOMESTEADS.—See the notes to *Paulsen* v. *Manske*, 9 Am. St. Rep. 538, and *La Crosse etc. R. R. Co.* v. *Vanderpool*, 78 Am. Dec. 699. That part of the Minnesota Mechanic's Lien Law subjecting homesteads to liens is unconstitutional: *Meyer* v. *Berlandi*, 39 Minn. 438; 12 Am. St. Rep. 663.

WOODMAN v. CALKINS.

[13 MONTANA, 363.]

BOND NOT SIGNED BY PRINCIPAL.—A BOND OF INDEMNITY purporting to be the bond of the plaintiff in the action, as principal, and two other persons as sureties, stipulating that the parties would save the constable harmless from a claim made to property levied upon by him, though not signed by such principal, is binding upon the sureties. Though the sureties sign on the condition and understanding that the principal would also sign, and never intended or consented that the bond should be delivered without his signature, they lost no substantial rights by his failure to sign with them, and if they did not make known to the officer accepting the bond the condition or understanding upon which they signed it he cannot be prejudiced thereby.

STATEMENT of the case by Mr. Justice DE WITT: This action is commenced by plaintiff, as constable, against the defendants, who were sureties on an undertaking to indemnify plaintiff, as constable, for holding property which he had seized on an attachment, and which was claimed by persons other than the defendant in the attachment suit. Archie Beaton brought suit against Patrick Leo, in the justice court, to recover seventy-four dollars. A writ of attachment was issued in that action, and given to plaintiff, a specially deputed constable, for service. The constable levied upon the sum of forty-five dollars and eighty-five cents in the hands of P. J. Touhy. Wise and Goodkind served written notice upon the constable, claiming the moneys, so levied upon, as belonging to them, and demanding the delivery of the same to them. The constable informed the plaintiff in the action of that fact. Thereupon the defendants executed and delivered to plaintiff a written undertaking, which is attached to the complaint in this action. In consideration of that undertaking the constable paid over the money so levied upon to the plaintiff in the action. The undertaking was to the effect that the parties thereto would save the plaintiff herein harmless from said claim of Wise and Goodkind. Afterwards Wise and Goodkind brought action against this plaintiff, and recovered judgment against him for the amount which they had so claimed as their property in the hands of said Touhy. Plaintiff now brings action against these defendants, sureties on said undertaking, for damages by reason of the judgment against him, which he had paid. The undertaking which these defendants gave named as parties thereto Archie Beaton as principal and R. M. Calkins and J. S.

Featherly as sureties. It was executed by the sureties only, and not by the principal. The above facts appear by the complaint in this action. The answer, among other things set forth "that it [the undertaking or bond] was signed by these defendants as sureties, on the condition and understanding that he [said Beaton] should sign it before it should be delivered; that said Beaton never signed the same, nor did any one in his behalf, and that these defendants never intended, nor consented, that it should be delivered without his signature." On the motion of plaintiff the court rendered judgment in favor of plaintiff, upon the pleadings. Did the plea of defendant, as to the agreement in reference to the delivery of the undertaking form an issue which should have been tried? If so, the judgment on the pleadings is contended by appellants to be error.

David B. Carpenter, for the appellants.

R. R. Purcell, for the respondent.

[365] HARWOOD, J. The foregoing statement of the case by Mr. Justice De Witt is sufficient for the purposes of this decision. The judgment of the trial court, in our opinion, should be affirmed.

Beaton, the principal, who procured the undertaking to be executed by the sureties on his behalf, and received the attached money from the officer (which money was not subject to the attachment), was liable therefor, without signing the undertaking, in an action by the officer, as well as to reimburse his sureties for whatever they were compelled to pay by reason of their engagement in said undertaking, on behalf of the principal. Both the principal and sureties could have been sued in the same action, or if the principal was not joined in the action brought by the officer against the sureties they could have required the principal to be brought in and made party defendant in the action against the sureties, and have execution levied against the principal first: *Hoskins* v. *White*, 13 Mont. 70; *Wibeaux* v. *Grinnell Livestock Co.*, 9 Mont. 154. [366] Thereby liability for the same damage would have been fastened upon the principal debtor, along with the sureties. No substantial right of the sureties was lost, by reason of the principal failing to sign said undertaking. Nor are they even inconvenienced thereby, for had they made the principal a party defendant with them

in the action against the sureties the instant there were shown grounds for recovery of damages from the sureties for the default of the principal the same showing would have been ground for judgment against the principal obligor also. The defense alleged by the sureties that the undertaking "was signed by these defendants as sureties on condition and understanding" that the principal, Beaton, should sign it also; "and that these defendants never intended nor consented that it should be delivered without his signature," involves no fact or condition, which, under the law, would have given them any right or remedy for reimbursement or contribution, which they do not already possess. Therefore, no substantial defense was set up by the answer in that respect, and the court ruled correctly in disregarding it: *Wibeaux* v. *Grinnell Livestock Co.*, 9 Mont. 154, and *Hoskins* v. *White*, 13 Mont. 70. The law, as expounded in the case of *Ney* v. *Orr*, 2 Mont. 559, when rightly considered, would lead to the same conclusion, because the pleading in the case at bar does not show that the officer who turned over the attached property to Beaton on receiving said undertaking for his protection in so doing was at all cognizant of the "condition and understanding" of the sureties that Beaton, the principal, should sign the undertaking before it was delivered; or that defendants "never intended that it should be delivered" without the signature of Beaton, principal. It has been held that such statutory undertakings are good and binding obligations of the sureties without the signature of the principal, who procures and delivers the same on his behalf. Therefore, so far as the undertaking shows on its face, the officer and his legal advisers were justified in accepting it as a good and valid obligation of the sureties, although not signed by the principal: *Pierse* v. *Miles*, 5 Mont. 549; *Hedderick* v. *Pontet*, 6 Mont. 348.

The argument, that under all circumstances or in all engagements on obligations, it cannot be affirmed as a legal proposition, [367] that it would be of no material legal advantage to the sureties to have the principal's signature on the bond or undertaking has no force in this case. The question in this case must be decided, and decided on the legal conditions involved in it. If the sureties have lost any material legal right by reason of the omission of the principal to sign this undertaking (obligating himself to do as principal what the law obliges him to do without the undertaking) it

has not been pointed out or in any manner suggested in this case. It is well known that there are bonds and obligations whereby the liability of both principal and sureties arise from, and is founded upon, the instrument alone, and where the principal could neither be held liable directly to the obligee nor collaterally as between him and the sureties without his signature, but such is not the case at bar. And we do not perceive how general suggestions of doubts respecting those cases are applicable in deciding this, or will aid in correctly deciding such other cases when they arise.

An order will be entered affirming the judgment of the trial court.

PEMBERTON, C. J., concurs.

DE WITT, J., concurring. I am not wholly satisfied that it is of absolutely no advantage to the sureties to have the principal's signature on the undertaking; nor am I satisfied that, under all circumstances, sufficient evidence of the liability of the signing sureties would also be alone proof of the liability of the nonsigning principal. I think cases might arise where the proof would have to go a pace further. But the suggested advantage to the sureties is probably not sufficiently substantial in this case to be noticed. I therefore concur in the affirmance.

SURETYSHIP—BOND NOT SIGNED BY PRINCIPAL.—A bond in which the officer is named as principal, but which is not executed by him, is *prima facie* invalid: *Board of Education* v. *Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767, and note, with the cases collected; *Weir* v. *Mott*, *ante*, p. 46, and note.

GORDON *v.* TREVARTHAN.

[13 MONTANA, 337.]

JURY TRIAL—QUOTIENT VERDICTS.—IF JURORS AGREE to mark various sums, add them together, and divide the aggregate sum by twelve, and that the result so ascertained shall be their verdict, such verdict is bad, and will be set aside. On the other hand, if, without any previous agreement, the amounts suggested by each juror are added, and the aggregate divided by twelve and the result accepted by jurors as their verdict, without any agreement between them that such shall be the case, such verdict is not objectionable.

JURY TRIAL.—THE AFFIDAVIT OF A JUROR MAY BE RECEIVED to attack his verdict under the statutes of Montana if such affidavit shows a resort to the determination of chance.

JURY TRIAL—DETERMINATION OF CHANCE, WHAT IS.—A juror resorts to the determination of chance whenever he resorts to any method of determination, the steps and results of which are beyond his calculation, and not followed nor participated in by his understanding, and, therefore, when a juror agrees to abide by a quotient verdict he resorts to the determination of chance.

JURY TRIAL—THE AFFIDAVIT OF A JUROR may be received to show that the verdict rendered was a quotient verdict, if the statute authorizes the reception of an affidavit of a juror for the purpose of showing that a verdict was a determination of chance.

W. I. Lippincott, for the appellant.

Charles R. Leonard, for the respondent.

[387] DE WITT, J. The plaintiff appeals from an order granting a new trial. The verdict and the judgment were in favor of the plaintiff for $167.63. The defendant moved for a new trial upon one ground only, to wit: "Misconduct of the jury": Code Civ. Proc., sec. 296, subd. 2. This section and subdivision are as follows: "The former verdict or other decision may be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of said party. Second, misconduct of the jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors." In support of this motion, the defendant filed an affidavit made by William J. McNamara and David Meiklejohn, two of the jurors, who deposed as follows: "That there was a disagreement among the members of the jury as to the verdict which should be rendered in said cause, and a proposition was thereupon made and agreed upon by the members of the jury that each member should indicate the amount for which he thought the plaintiff should recover, if at all, and that the sums thus indicated should be added together, and the sum so found should thereupon be divided by twelve, and the [388] quotient thus found should be and constitute the amount in which plaintiff should recover; and said jurors agreed to abide by the result arrived at in this manner; that in this manner the agreement upon a verdict was reached, and the verdict of $176 ($167.63) arrived at. Affiants further state that they, and each of them, were induced to assent to said verdict on account of said proposition so made and carried out." The

plaintiff, in opposing the motion, filed the affidavit of J. R. Silver, W. H. Young, Joel Crossman, and David Meiklejohn. These jurors, in their affidavit, present a somewhat different view of the conduct of the jury than that set out in the other affidavit. They say, in effect, that the jurors agreed that each one should set down an amount that he thought plaintiff should recover, and that the amount should be divided by 12; that each thereupon set down an amount, and that the total was divided by 12, and the quotient found to be $167.63; that, after this sum was found, the jurors discussed the matter as to whether that should be the amount of the verdict, and it was unanimously agreed that said sum should be the verdict, and it was thereupon inserted in the verdict, and the jurors were asked by one of their number if that should be their verdict, and they, or most of them, answered "Yes," and no objection was made by any juror. Thereupon the foreman signed the verdict, and it was returned into court. The motion for new trial was heard upon these affidavits, and by the court granted. The plaintiff appeals from this order.

[1] The question upon this appeal is upon what the cases and books have called "quotient verdicts." Verdicts arrived at by methods such as described in the McNamara affidavit in this case have been held bad when properly before courts on motion for new trial. But the facts vitiating such verdicts are the agreement by the jurors to go into the process of marking amounts, adding them, and dividing the same by 12, and the agreement that the result so obtained shall be the verdict, without further consideration; and the fact that such proceedings were taken by the jury in pursuance to such an agreement, and that the result so obtained was returned as the verdict. (Thompson and Merriam on Juries, sec. 408 et seq., and numerous cases cited; *Goodman* v. *Cody*, 1 Wash. Ter. 329; 34 Am. Rep. 815, note.)

On the other hand, it is held that a verdict reached after the quotient process having been had by the jury is not vicious [2] "where the calculation is purely informal, for the purpose of ascertaining the sense of the jury, and every juror feels at liberty to accept, reject, or qualify the result, according to his convictions. Under such circumstances the jury may adopt as their verdict the exact quotient found, and it will be good." (Thompson and Merriam on Juries, sec. 410, and cases cited and also cited in appellant's brief.) The distinction between good verdicts and bad verdicts where the

quotient process has been used is well stated in a very old case, as follows: "If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is not an objection to the verdict." (*Dana v. Tucker*, 4 Johns. 487. See, also, Hayne's New Trial and Appeal, sec. 71.)

The question, then, in this case is, what was the nature of the resort to the quotient process by this jury? The affidavit of Meiklejohn and McNamara is clearly to the effect that the conduct of the jury was of the kind first above described—the kind which the cases hold vitiates the verdict. The affidavit of Young and others tends to present the conduct of the jury as innocent, and being simply informal, for the purpose of obtaining the sense of the jurors. Meiklejohn signed both affidavits, but McNamara stands upon his affidavit, and did not sign the Young affidavit. Our statute says that whenever any one of the jurors shall have been induced to assent to a verdict by a resort to the determination of chance, such misconduct may be proved by the affidavit of such juror. Such conduct is so defined by the statute to be misconduct. So it appears from McNamara's affidavit that at least one juror—that is, himself—was induced to assent to this verdict by reason of the quotient proceeding; so it would seem that this, under the statute, is enough to vitiate the verdict. The affidavit of Young and others is to some extent contradictory of the McNamara-Meiklejohn affidavit, but that contradiction was resolved by the district court in favor of the McNamara affidavit.

[391] We are therefore of the opinion that the order should be affirmed if this quotient proceeding is to be considered as a "resort to the determination of chance"; for that is the language of subdivision 2, section 296, Code of Civil Procedure. This rule is that the affidavit of a juror may be taken to support his verdict, but not to attack it. (*Turner v. Tuolumne County Water Co.*, 25 Cal. 398; Thompson and Merriam on Juries, sec. 440, and cases cited; Hayne's New Trial and Appeal, secs. 73, 74.) Section 296 of the Code of Civil Procedure makes an exception to the rule, so that the affidavit of a juror may be taken to attack the verdict if the

juror has assented to the verdict by reason of a resort to the determination of chance.

The California supreme court, under the same statute as we now have, held long ago that this quotient proceeding was not a resort to the determination of chance. That court said: "But, independent of authority, it is manifest that there is no element of chance in such a verdict. Each juror marks a sum, which, in his judgment, represents the true amount of damages. Neither of these sums is the result of chance; on the contrary each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor a quotient resulting from a division of the aggregate by twelve, the result of chance, but, on the contrary, the result of the most accurate of the sciences. Thus, from the commencement to the end of the process, no quantity which enters into the final result is determined by a resort to chance": *Turner* v. *Tuolumne County Water Co.*, 25 Cal. 403. But this case has received by no means a cordial approval by text-writers and other courts. Thompson and Merriam on Juries refers to the case, and the language which we have just cited, and says: "This reasoning seems hardly conclusive. It proceeds upon the hypothesis that at the time the jurors consent to be bound by the result of the addition and division it is certain that each juror will mark down his estimate of the damages; hence this process of finding a verdict is as exact as the science of mathematics. But the contrary is the fact. The jurors consent that their verdict shall vary from abstract justice in that degree that each juror deviates from sound judgment. All the prejudices, whims, and caprices which sway a [393] juror in his deliberations are given full play, and they measurably affect the final result. Nothing could well be more the sport of chance than a conclusion reached in this manner": Thompson and Merriam on Juries, sec. 415. See, also, *Warner* v. *Robinson*, 1 Root, 195; 1 Am. Dec. 38; *City of Pekin* v. *Winkel*, 77 Ill. 56, 58; *Parham* v. *Harney*, 6 Smedes & M. 55.

The California case also receives a severe criticism in *Goodman* v. *Cody*, 1 Wash. Ter. 329, 34 Am. Rep. 808. We cite from that case as follows:

"Among all the cases that have been cited in favor of and against the verdict in the case at bar being considered one got by chance determination we find none in which the meaning of the word 'chance' is discussed, and all the cases, in

this respect, are unsatisfactory. The word 'chance' has not been adopted or defined as a law term, is not technical, and must be deemed used by the legislature in a popular sense. According to generally accepted and ordinary uses of the word, any thing is said to have happened by chance to any one which was neither understandingly brought about by his act nor pre-estimated by his understanding. If any one move his arm inconsiderately, and by the movement unintentionally break a crystal vase, we say he did it by chance; for his intelligence did not, from step to step, estimate or direct the action to its result. Yet, although the result was a chance one, it was the certain, inevitable result of assured relative positions of the arm and the vase, and the muscular action, perhaps voluntary, of the former. Again, when a die is thrown, the position in which the die will fall is a necessary effect from well-known, but unestimated causes. By the original position of the die, its size, form, and weight, the manipulation given it, the distance and velocity of the throw, the sort of surface it falls upon, and perhaps other things, the final position of the die is determined with mathematical certainty, and may, by any painstaking mathematician possessed of the elements of the problem, by the use of 'the most accurate of the sciences,' be calculated with infallible precision. Still we may say, and properly say, that the final position of the die is determined by chance; and by this we mean, not that the result of the throw was uncertain, or a consequence of unknown causes, but that it was produced by causes the efficient [393] and proportionate operation of which were in fact by the person to whom it chanced neither estimated nor intelligently controlled for the accomplishment of the result. With the same propriety we speak of meeting by chance a person at a certain place at a certain time; and this, no matter how exactly we have precalculated and intended being ourselves at that place at the particular time, nor how exactly that person may have precalculated and intended being himself at the same place at the same time likewise, provided we to whom the chance happens did not precalculate nor consciously bring about the meeting then and there.

"From the popular use of the word 'chance,' as illustrated in these examples, it seems plain to us that a juror resorts to the determination of chance for a verdict whenever he resorts to any method of determination the steps and results of which are beyond his calculation, and unfollowed and un-

participated in by his understanding; and all the jurors resort to such a method when they resort to the method of average. With a verdict got, fairly as between the jurors, by such a method, the conclusion attained by the intelligence of any one juror never coincides, unless the average of the conclusions of all the jurors happens to be identical with his own; whereas, in a good verdict, every element of chance is eliminated by the fact that before the verdict is complete every intelligence on the jury, being first well apprised of the action of every other, has, by its own individual, conscious action, ratified and arrived at the same conclusion with every other. In a verdict got by the method of average every sum that goes to develop the verdict is a chance sum as to each juror, save the sum that the juror himself sets down; and the verdict is not redeemed from being a chance verdict as to each juror, and therefore chance as to all, by the fact that each has contributed to it an element not of chance, any more than a dice throw would be redeemed from being chance by the fact that the throw was in part controlled by certain intentional motion of the dice-box": See, also, the note to this case by the editor of the American Reports; see, also, *Williams* v. *State*, 15 Lea, 129; 54 Am. Rep. 404; *Parham* v. *Harney*, 6 Smedes & M. 55; *Wilson* v. *Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Flood* v. *McClure* (Idaho, Feb. 3, 1893), 32 Pac. Rep. 254.

394 With due respect to the California court, from which this court for many years has drawn much that was useful and satisfactory, we cannot but hold that the cases which have repudiated *Turner* v. *Tuolomne County Water Co.*, 25 Cal. 397, state the better and more reasonable doctrine. Nothing occurs to us which would add force to the criticisms above cited of the California case. We therefore hold that such resort to the quotient process as is set forth in McNamara's affidavit is a resort to the determination of chance.

Since writing this opinion there have been published and come to our attention the cases of *Dixon* v. *Pluns*, 98 Cal. 384; 35 Am. St. Rep. 180, and *Weinburg* v. *Sompe*, Cal., June 9, 1893 (not reported), in which the California supreme court desert the doctrine of *Turner* v. *Tuolumne County Water Co.*, 25 Cal. 397.

The order granting the new trial in this case is affirmed.

HARWOOD, J., concurs.

TRIAL—AFFIDAVIT OF JUROR TO IMPEACH VERDICT.—No affidavit, deposition, or other sworn statement of a juror can be received to impeach or explain a verdict, or to show on what ground it was rendered: *Weatherford* v. *State*, 31 Tex. Cr. Rep. 530; 37 Am. St. Rep. 828, and note, with the cases collected; *Palmer* v. *People*, 138 Ill. 356; 32 Am. St. Rep. 146; *St. Martin* v. *Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494, and note.

TRIAL—CHANCE VERDICTS.—A verdict of damages ascertained by averaging the aggregage separate markings of all the jurors in accordance with a precedent agreement to abide the result is arrived at "by chance," and will be set aside: *Goodman* v. *Cody*, 1 Wash. 329; 34 Am. Rep. 808, and note; *Dixon* v. *Plunz*, 98 Cal. 384; 35 Am. St. Rep. 180, and note. A verdict will be set aside when the jurors agree each to specify a sum as due to the plaintiff, and divide the aggregate by twelve, and take the quotient as the result: *St. Martin* v. *Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494. But if there is not prior agreement by the jury to be bound by the verdict obtained in the above way it will be sustained: *Village of Ponca* v. *Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and note. See, also, the extended note to *Hilton* v. *Southwick*, 35 Am. Dec. 259.

FERGUSON *v.* SPEITH.

[13 MONTANA, 487.]

LAWS EXEMPTING PROPERTY FROM SALE UNDER EXECUTION should be liberally construed.

HOMESTEAD.—A PARTNER IS ENTITLED AS AGAINST CREDITORS OF THE FIRM to claim and hold a homestead in the partnership real estate.

H. C. Cockrill and Charles S. Hartman, for the appellants.

E. P. Cadwell, for the respondent.

487 PEMBERTON, C. J. It appears from the record in this case that in the year 1867 respondent Jacob F. Speith and one Charles Krug entered into copartnership in the brewing business in Bozeman, in this state; that Speith put into said business the sum of three thousand five hundred dollars, Krug failing to contribute any thing in cash; that in April, 1873, said partners purchased the property in dispute with partnership funds; that in May of that year Speith with his family took possession of the premises, and has occupied them ever since with his family as a home, and now so occupies them.

Krug, the other copartner, also occupied a room in said dwelling-house, and it appears that the employees of the firm boarded at the table which was maintained in said house at the expense of the partnership firm. Krug died, and the partnership assets were attached, the title of said property

standing in the name of the firm. Said property was attached and sold under certain executions in May, 1890, and plaintiff became [488] the purchaser. Defendant Speith, however, at the time of the sale, and during the whole course of the contention, insisted that said property was subject to his homestead claim, giving plaintiff full notice of his claim. This action, in the nature of ejectment, was brought by Ferguson, claiming title under said execution sale to obtain possession of said premises. Speith sets up his homestead claims in defense of the action. The land does not exceed in value or extent the statutory allowance for a homestead. The case was tried by the court below without a jury. The findings and judgment were in favor of the defendants. Plaintiff appeals.

[489] The question for this court to determine is this: Is a partner entitled to claim and hold a homestead exemption out of the partnership estate? Section 322, first division, Code of Civil Procedure, reads as follows:

"SEC. 322. A homestead consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling-house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling-house thereon, and its appurtenances, [490] owned and occupied by any resident of this territory (state) shall not be subject to forced sale on execution, or any other final process from a court: *provided*, such homestead shall not exceed in value the sum of two thousand five hundred dollars."

It will be observed that this statute does not except partners from the benefits thereof. In *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578 (a case involving the right of partners to claim the statutory exemptions), Mr. Justice Porter, speaking for the court, says: "The argument submitted for the appellant is ingenious; but its fallacy is apparent, in view of the conclusions to which it tends. If it proves any thing it is that the property of a firm is not owned by the persons who compose it, either collectively or otherwise. It certainly does not belong to any one else, and if the appellant is right, the title is in a state of abeyance. If the partners have such an ownership as subjects the property to seizure on execution,

they have also such an ownership as entitles them to claim its exemption, in a case plainly falling within the terms and intent of the statute.

"In the instance before us the complaint alleges, and the answer admits, that the horses and harness in question were the property of the plaintiffs. The facts found by the referee meet all the requirements of the act, exempting from levy and sale the necessary team of 'any person being a householder or having a family for which he provides': 4 Edm. Stats. 626. It is insisted that the clause applies only to a several owner, as the word 'person' is used in the singular number. The short answer is, that by a provision in our general law, when a statute refers to any matter or person, by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language employed: 2 Rev. Stats. 778, sec. 11.

"In respect to articles otherwise within the terms of the act, such ownership as suffices to make them subject to seizure brings them within the exemption. If each of the respondents had owned a pair of horses, both teams would have been exempt upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the plaintiffs 491 forfeited its protection by owning but a single team between them, used for the common support of both.

"The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them; the interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce a family dependent on him for support. The judgment should be affirmed": See note to this case in 93 Am. Dec. 579.

In *Blanchard* v. *Paschal*, 68 Ga. 32, 45 Am. Rep. 474, involving the rights of partners to homestead exemptions, the court say: "The questions made by the record are, first, whether, if a portion of the personal property included in the schedule of applicant belonged to the firm of Paschal and Heidingsfelder at the time the same was levied upon, and no

of seizure while in transit: *Bunker* v. *Paquette*, 37 Mich. 79. And a boarding-house keeper is entitled to the same exemption of household furniture as any other person: *Vanderhorst* v. *Bacon*, 38 Mich. 669; 31 Am. Rep. 328.

That the several members of a copartnership come within the language of the statute and constitution there should be no question, and that they, by becoming members of a firm, do not place themselves beyond the pale of the reason of the law would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of a firm. The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this [494] respect no distinction can exist between those who are members of a firm and those who are not.

Indeed, it is not claimed that members of a firm are not equally within the words and protecting care of the constitution and statute, but that the right is not given them, because of the peculiar rights of copartners to the firm property, as between themselves, and also their creditors.

If the property is exempt under the statute, parties dealing with them must take notice of that fact, and it is no hardship whatever to enforce the right when the occasion arises which demands it. The creditor, in selling goods to the individual, knows that a certain portion of his debtor's property is not, and will not be, subject to his demands. And so if he sells to a firm, and the firm, or each member thereof, is entitled to a statutory exemption, the creditor sells in view of the hazard. There may be cases where, as between the members (and the same, perhaps, would not apply as to creditors), where one or more of the firm had no interest in the goods, but only in the profits, and some question might arise as to the right of such copartners to claim any part of the property as exempt; but such is not this case, and we do not, therefore, pass upon that question. So other difficulties may arise. Very many of these supposed difficulties are imaginary only, but we need not anticipate them. In my opinion, the execution debtors in this case were each entitled, under our constitution and statute, to his exemption: *Russel* v. *Lennon*, 39 Wis. 570; 20 Am. Rep. 60; and see the reasoning, also, in *Stewart* v. *Brown*, 37 N. Y. 350; 93 Am. Dec. 578.

And it may be observed that the supreme court of Michigan, at the time of the rendition of this opinion, was composed of such able jurists as Chief Justice Marston, Benjamin F. Graves, Thomas M. Cooley, and James V. Campbell.

In *Swearingen* v. *Bassett*, 65 Tex. 267, a case involving the right of a partner to a homestead out of the firm estate, the court say: "The decisions and the statutes referred to illustrate the tendency of our laws. Right or wrong, wise or unwise, from the beginning, neither the people in convention, nor the legislature, nor the courts have taken any backward steps. Every change has extended the protection, and [495] these have been sufficiently frequent to make the progress of expansion a steady march. When the courts have hesitated or halted they have been brought forward into line by the law-making power.

"In the absence of the definite legislation to guide us, and in obedience to the progressive tendency adverted to, we hold, against the preponderance of authority, but with the preponderance of reason, that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale."

See, also, *Evans* v. *Bryan*, 95 N. C. 174, 59 Am. Rep. 233, in which case the court hold that a partner is entitled to have his exemption set apart to him out of the partnership estate.

In Iowa the courts hold that a tenant in common may have a homestead set apart to him out of the common property (see *Hewitt* v. *Rankin*, 41 Iowa, 35; *Thorn* v. *Thorn*, 14 Iowa, 49; 81 Am. Dec. 451), and a number of the cases cited above hold that partners in real estate are in fact tenants in common.

In Minnesota, from which state our statutes of exemptions seem to have been taken, it is settled that a tenant in common is entitled to a homestead out of the common estate. This court has held that a tenant in common is entitled to a homestead out of the common property: See *Lindley* v. *Davis*, 7 Mont. 206. We are aware that a great many authorities hold that a partner or tenant in common is not entitled to a homestead out of the partnership or common estate. Perhaps, in the language of the Texas case, *supra*, the "preponderance of authority" is that way, but we think in the language of the same authority "the preponderance of reason" is with the authorities quoted above, to the effect that partners and tenants in common are entitled to a

homestead out of the partnership or common estate. Our statute does not except partners or tenants in common from the benefit of its provisions. In *Lindley* v. *Davis*, 7 Mont. 206, our court says: "There is no pretense that the word 'owner' cannot be applied to a tenant in common." If the word "owner" as used in our statute includes tenant in common, by what kind of reason or logic can it be held to exclude partner? If so held it would be in effect to construe our statute to mean and read, in the language of [496] the Georgia case, *supra*, "that each head of a family in this state shall be entitled to an exemption of personalty, and a homestead of realty, except partners, and they shall be excluded until they pay off and discharge all their partnership liabilities." This construction we consider too narrow and illiberal, and not authorized by the language of our statute.

Our constitution, article 19, section 4, is as follows: "The legislative assembly shall enact liberal homestead and exemption laws." The trend of the later and best considered adjudications is towards a liberal construction in favor of the debtor in such cases. In *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578, the learned court say: "The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them; the interest it assumes to protect is that belonging to the debtor, be it more or less."

The tendency of legislation is in the same direction of liberality. Our own court has uniformly given a liberal construction to our exemption and homestead laws. The common law stripped the debtor of all his property, if necessary to pay his debts, and put him in jail if he had not enough to pay in full. But we have traveled a long way from the inhumanity and cruelty of this system, and still the tendency is to a higher plane of liberality and humanity. The illiberal construction of our statute contended for by the appellant in this case, and heretofore and now in vogue in many jurisdictions, is too narrow and harsh; is not in keeping with the spirit of humanity that pervades the later best-considered cases on the subject. It is retrogressive, and, if adopted, would relegate a large portion of our population to the rigors and cruelties of the common law.

We, therefore, hold that a partner, having the necessary qualifications, is entitled as against creditors of the firm to claim and hold a homestead in the partnership estate.

But this is not to be understood as affecting in any way the mutual rights and relations of partners among themselves in adjusting their rights and interests in the partnership estate.

The judgment of the court below is affirmed.

497 DE WITT, J., concurring.—I concur in affirming the judgment. The case of *Lindley* v. *Davis*, 6 Mont. 453, 7 Mont. 206, was earnestly contested by counsel, and deliberately considered by the court.

It was finally held that a cotenant was entitled to homestead in real estate held in cotenancy: *Lindley* v. *Davis*, 7 Mont. 206. That decision remaining undisturbed decides, I think, the case before us. In that case the court held that the facts showed that the premises had, by the partners, been withdrawn from the partnership assets, and were owned by the partners as cotenants, as in any other cotenancy (regardless of the partnership relations of the owners), and that they had been devoted to the homestead of the partner Davis, the defendant in the case.

I think, in the case at bar, that there is a stronger showing of a withdrawal of the premises, by the partners, from the partnership assets (if they ever were such), and a devotion of the same to the homestead of Speith. Such facts, and the application of the decision in *Lindley* v. *Davis*, 7 Mont. 206, that the cotenant is entitled to homestead in the common property, are sufficient, in my mind, to sustain the homestead claim of Speith. I therefore concur in the judgment pronounced.

EXECUTION—EXEMPTION LAWS—CONSTRUCTION.—Exemption laws should be liberally construed so as not to defeat the beneficial intention of the legislature: *Elliot* v. *Hall*, 2 Idaho, 1142; 35 AM. ST. REP. 285, and note, with the cases collected.

HOMESTEAD IN PARTNERSHIP REALTY: See the notes to *McCoy* v. *Brennan*, 1 Am. St. Rep. 594, and *Pryor* v. *Stone*, 70 Am. Dec. 346.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

DEWEY *v.* ALLGIRE.

[37 NEBRASKA, 6.]

DEED OF INSANE PERSON—AVOIDANCE OF—EVIDENCE.—The record of statutory proceedings adjudging a person insane and a fit subject for treatment in a hospital for the insane, is not admissible in evidence to prove the insanity of such person in an action to avoid a deed made by him.

APPELLATE PRACTICE—IMMATERIAL ERROR.—Error cannot be predicated upon the admission of immaterial testimony in a case tried by the court without a jury when the evidence otherwise justifies the findings and judgment.

INSANE PERSON—AVOIDANCE OF—DEED OF.—In the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, does not avoid his deed; but it may be avoided for actual insanity inducing the conveyance, although the evidence does not show an absolute want of reason and understanding at the time of its execution.

INSANE PERSON—DEED OF—AVOIDANCE OF BONA FIDE PURCHASER—RESTITUTION OF CONSIDERATION.—The deed of an insane person may be avoided as against his grantee without notice and as against an innocent purchaser from such grantee without restitution of the consideration paid by the last purchaser.

E. O. Kretsinger and T. F. Burke, for the appellants.

Hazlett, Bates, and Le Hane, for the respondents.

IRVINE, C. On the twelfth day of November, 1889, [illegible] John Paulsen, who was then the owner of a farm lying in Gage and Pawnee counties, which had for some years been occupied as a homestead by Paulsen and wife, conveyed said farm to Lyman W. Allgire, Paulsen's wife joining in the conveyance, and received in return certain lots in Blue Springs and in Wymore. On November 26, 1889, Allgire conveyed the undivided one-half of the Paulsen farm to the

defendant Mowry. In February, 1890, Paulsen was adjudged insane, and the plaintiff Dewey was appointed his guardian. Dewey, within a few days of his appointment, instituted this action against Allgire, Mowry, and Lena Paulsen, the latter being the wife of John Paulsen, for the purpose of setting aside the conveyance to Allgire upon the ground that Paulsen was insane at the time of its execution. A decree was rendered in accordance with the prayer of the petition, finding all the material facts for the plaintiff, vacating the conveyances from Paulsen and wife to Allgire and from Allgire to Mowry. It appeared in evidence that immediately after the exchange was made Paulsen and wife separated, and conveyances of the Blue Springs and Wymore property were made, whereby what was estimated as one-half in value thereof was conveyed to Lena Paulsen. The decree ordered a reconveyance of all of this property. The case was brought to this court upon appeal by Allgire and Mowry.

The questions involved in the case are discussed in the briefs under a number of heads. For the purposes of this opinion all these questions classify themselves within five topics.

1. Upon the trial for the purpose of proving the insanity of Paulsen the records of two proceedings were introduced in evidence, the one in Pawnee county in 1886, and the other in Gage county in 1890. These proceedings were had under sections 17 to 23 of chapter 40 of the Compiled Statutes, and in each case Paulsen was adjudged insane, and a fit subject for custody and treatment in the hospital for the insane. There is considerable discussion in the briefs of the effect of these records as creating presumptions of insanity by reason of the adjudications and commitments, and of sanity by reason of the discharge of Paulsen as recovered. But the appellants raised a broader question by objecting to the introduction of the records in evidence, and, in the view we take of that question, all others relating to the records are eliminated from the case. An inspection of the statutes under which these proceedings were had discloses that the sole object of such proceedings is to ascertain whether or not the person alleged to be insane is a fit subject for custody and treatment in the hospital. The proceedings may be *ex parte*. The commissioners are required to take testimony upon the subject, and any citizen of the county, or relative of the person charged, may appear and resist the application,

but no notice to any one is required, and the commissioners may, if they see fit, dispense with the presence of the person charged during their proceedings. By section 54 of the same chapter the term "insane" as used in the act is defined to include every species of insanity or mental derangement.

At the common law an inquisition founded upon a commission *de lunatico inquirendo*, resulting in an adjudication of insanity, was held to be in all cases *prima facie* evidence, and sometimes conclusive of the insanity of the person charged. This was upon the ground that such a proceeding was in the nature of one *in rem* to determine the *status* of the party, and was therefore binding upon the whole world. This proceeding bore a close analogy to the proceedings under our statute whereby guardians are appointed for persons insane. It differs very materially, however, from a proceeding looking toward the custody and treatment of a person in the hospital. In the latter proceeding the examination is more or less *ex parte*, and its object, under the broad definition of insanity before referred to, presents an issue entirely different from that presented in this case, which is, the competency of the party to manage his own affairs and enter into a valid contract. The records of similar proceedings have been held inadmissible in such cases as we are now considering in *Leggate* v. *Clark*, 111 Mass. 308, and in *Knox* v. *Haug*, 48 Minn. 58, and we think the reasoning in those cases is sound. In the case of *Wheeler* v. *State*, 34 Ohio St. 394, 32 Am. Rep. 372, it was held that while such inquisitions were not even *prima facie* evidence of insanity, they were admissible as tending to prove the fact; but the authorities cited in the opinion in the latter case are all based upon inquisitions *de lunatico*, and the court seems to have mistaken the distinction between the subjects of inquiry in the two proceedings. We think that these records were improperly admitted in evidence.

This leads us to a consideration of the question whether the evidence, aside from the insanity proceedings, was sufficient to justify the finding of the court, for if it was, the decree should not be disturbed. It has been repeatedly held that error cannot be predicated upon the admission of immaterial testimony in a case tried to the court where the evidence otherwise justifies the finding.

2. Before examining the evidence, however, a question is presented as to the degree of mental incapacity which must exist in order to avoid a conveyance. In the case of *Mulloy*

v. *Ingalls*, 4 Neb. 115, this court held that in the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a total want of reason or understanding. [10] In several other cases this general doctrine has been restated, and it must be taken as the settled law of the state. We think, however, that counsel for the appellants have somewhat mistaken the true import of the language used in these cases. It is very clear that the courts have never meant by such language that a deed will not be set aside unless the grantor, at the time of its execution, showed an absolute want of reason and understanding in every particular. It has been repeatedly held that the deed of one afflicted with monomania may be set aside where the execution of the deed was induced by the disease. The rule, in fact, means this: That one in the possession of his normal faculties, and not afflicted with idiocy or actual insanity, may not in the absence of fraud avoid his deed, even though he be of inferior intellectual capacity; that the law will not undertake to discriminate between strong and weak minds, except to consider weakness of mind in connection with evidence of fraud; that the line is drawn at actual insanity inducing to the conveyance—insanity as distinguished from mere weakness of mind unaccompanied by mental disease overthrowing the reason.

3. Measured by this test the evidence is ample to sustain the finding of the trial court. It appears that Paulsen came to Nebraska a number of years ago, bought the farm in controversy, and for several years conducted it in a profitable and apparently skillful manner. In 1886 he became the victim of a delusion to the effect that he constantly carried about with him a man who rode upon his shoulders and controlled all his actions. This was unmistakably an insane delusion which continued to possess him for years. He became sullen and morose, refusing to speak to his neighbors, and forbidding his wife to visit them. In 1889 he suddenly became a religious enthusiast, going many miles alone to church, and in one instance, at least, persisting in remaining in the church throughout the day, after the service was concluded. At times he worked industriously; [11] at others, without apparent reason, he refused to work for long intervals of time, spending such periods in the house reading his Bible, while his wife did the necessary work upon the farm, and neighbors marketed his stock for him. These occurrences are brought

down by the evidence, to and beyond the time of the execution of the deed. Several neighbors testified that, in their opinion, he was, at the time of the execution of the deed, incompetent to manage his affairs, and incapable of understanding the nature of such transactions. These witnesses, while not experts, stated the facts upon which their opinions were based. Such testimony is competent, and its weight was for the trial court to consider. A number of other facts appear in evidence tending to show a deranged mind. The transaction itself is shown by the preponderance of the testimony to be one manifestly to Paulsen's disadvantage. While an adjudication of insanity in proceedings to appoint a guardian has been held not admissible to prove insanity at a period long prior to the inquisition, still we think that the adjudication, whereby the plaintiff was appointed Paulsen's guardian only three months after the disputed conveyance, was sufficiently near in point of time to have some weight as evidence. We are satisfied that the trial judge was justified by the evidence in finding as he did.

4. It is claimed that no decree can be rendered as against the defendant Mowry, for the reason that he was a *bona fide* purchaser from Allgire without notice of Paulsen's insanity. The trial court found that he was not a *bona fide* purchaser, but whether he was or not the deed should be vacated as against him. It is not a question as to whether the deed of an insane person is void or merely voidable. The cases declaring such a deed voidable are those wherein the question was one of affirmance or ratification. While some authorities hold that an executed contract made fairly, and upon adequate consideration, with an insane person, but without notice of his insanity, cannot be rescinded; [12] and while other authorities hold that a conveyance from an insane person, upon adequate consideration, will not be avoided as against a grantee taking without notice of the insanity without restoring the consideration, we know of no case holding that mere *bona fides* will protect the grantee of an insane person against a bill to set aside the deed where restitution is made. The decree in this case makes complete restitution to Allgire. While this is equitable we do not think it necessary, and as to Mowry, restitution of the purchase money paid by him to Allgire, if any, must rest between those two. It is well said by Thomas, J., in *Gibson* v. *Soper*, 6 Gray, 279, 66 Am. Dec. 414, that "To say that an insane man before he can avoid a voidable

deed must first put the grantee *in statu quo* would be to say in effect that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain so as to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming when with restored intellect he shall seek its annulment." The same doctrine is held in other cases, notably that of *Hovey* v. *Hobson*, 53 Me. 451; 89 Am. Dec. 705; and *Crawford* v. *Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766. In the Maine case it was held that the *bona fide* grantee of the grantee of an insane person must rely on the covenants of his deed for restitution, and that it is not necessary that he should be placed *in statu quo* by the plaintiff in a suit to vacate the conveyance.

5. Some argument is based upon the fact that the farm was a homestead, and that Lena Paulsen joined in the conveyance. It was charged in the petition that she did so under duress from her husband. We think the evidence is not sufficient to show duress, but that question is not material. The homestead can only be conveyed by an instrument executed and acknowledged by both husband and [13] wife: Comp. Stats., c. 36, sec. 4. The instrument in question was not validly executed by the husband for want of mental capacity; the wife's joining did not validate it. Moreover, she was a party to the action, is bound by the decree, and the decree requires her to reconvey all that she has received.

The decree of the district court is right and is affirmed.

The other commissioners concurred.

INSANE PERSONS—AVOIDANCE OF DEEDS OF—EVIDENCE.—The validity of a deed is not affected by a commission subsequently adjudging the grantor to be an imbecile: *Jackson* v. *King*, 4 Cow. 207; 15 Am. Dec. 354, and note at page 368.

INSANE PERSONS—AVOIDANCE OF DEEDS OF—WEAKNESS OF MIND—FRAUD.—Mental unsoundness may be sufficient to invalidate a deed, though it is but a very modified degree of incapacity, if the transaction is accompanied with fraud or imposition: *Corbit* v. *Smith*, 7 Iowa, 60; 71 Am. Dec. 431, and note. The deed of a lunatic will not be set aside even though the grantee therein knew of the grantor's mental incapacity if no fraud was practiced on the latter, nor undue influence exercised over him and the deed was under advice of his counsel and for a fair consideration: *Odom* v. *Riddick*, 104 N. C. 515; 17 Am. St. Rep. 686, and note. Mere imbecility or

weakness of understanding not amounting to idiocy or lunacy is not sufficient to avoid a deed at law: *Jackson* v. *King*, 4 Cow. 207; 15 Am. Dec. 354, and extended note. See, also, the notes to *Lindsey* v. *Lindsey*, 99 Am. Dec. 491, and *Pearson* v. *Cox*, 10 Am. St. Rep. 744.

INSANE PERSONS—AVOIDANCE OF DEEDS OF—RETURN OF CONSIDERATION. Where land is conveyed by an insane person before an inquisition and finding of lunacy, for a fair consideration without knowledge of the insanity on the part of the purchaser, the conveyance cannot be avoided if the consideration has not been returned and no offer to return it has been made: *Cribben* v. *Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; note to *Jackson* v. *King*, 15 Am. Dec. 367.

STATE *v.* LEESE.

[37 NEBRASKA, 92.]

IMPEACHMENT OF OFFICERS—CONSTITUTIONAL LAW—DELEGATION OF POWER. When the constitution has conferred the power of impeachment solely upon the state legislature in joint convention the latter cannot delegate such power to managers of impeachment appointed by it, nor can such managers change or amend in any material matter the specifications in the articles of impeachment adopted and presented by the legislature.

IMPEACHMENT OF OFFICERS—JURISDICTION.—After the expiration of his term of office the state legislature has no power to prefer, nor has the supreme court any power to try, articles of impeachment against a state officer.

G. W. Doane, S. B. Pound, W. L. Greene, and G. M. Lambertson, for the state.

William Leese and John M. Stewart, for the respondent.

[93] NORVAL, J. The legislature of this state at its last session adopted and presented to this court articles of impeachment against William Leese, ex-attorney general, charging him with misdemeanors in office during the period he was attorney general of the state. Within the time fixed by the court therefor, the respondent answered the articles of impeachment exhibited and presented against him and to each and every specification therewith. Subsequently the managers appointed by the legislature to prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in said articles of impeachment, to which proposed amendments the respondent at the time objected. At the hearing, the application to file amended specifications was denied, and we will now briefly state the reasons for the conclusion then reached.

Section 14, article 3, of the constitution declares that "The senate and house of representatives, in joint convention [94]

shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention for the purpose of acting upon such resolution within three days of such notification," etc.

By the foregoing provision the exclusive power of impeachment is conferred upon the legislature. Both houses of that body are required to meet in joint convention to act upon a resolution to impeach a state officer for any misdemeanor in office, and such a resolution can only be adopted or carried by the affirmative vote of at least a majority of all the members elected to the legislature. The authority thus given carries with it the power of the senate and house of representatives, under like restrictions, to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter, or amend one which has been duly passed, and in neither case does the right exist.

Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to permit the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court, no amendment of the instrument, in matter of substance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indictment: [95] *People* v. *Campbell*, 4 Park. Cr. 386; *Gregory* v. *State*, 46 Ala. 151; *Johnson* v. *State*, 46 Ala. 212; *McGuire* v. *State*, 35 Miss. 366; 72 Am. Dec. 124; *State* v. *Sexton*, 3 Hawks, 184; 14 Am. Dec. 584; *State* v. *McCarty*, 2 Pinn. 513; 54 Am. Dec. 150; *Ex parte Bain*, 121 U. S. 1. We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeachment exhibited against the respondent. If they could do that, it

necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent, not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the legislature, might have rejected, had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the constitution.

In reaching the conclusion stated above we have carefully considered and given due weight to the last paragraph of the articles of impeachment, which reserves to the senate and house of representatives of the state of Nebraska, in joint convention assembled, "the liberty of exhibiting at any time hereafter any further articles or other accusations or impeachments against the said William Leese, late attorney general of the state of Nebraska." All that can be reasonably claimed for this provision is that the joint convention of the two houses of the legislature reserved the right to adopt other and additional articles of impeachment against the respondent. But the legislature has not preferred other or further accusations against him, nor does the clause above mentioned attempt to confer such authority upon the managers of impeachment. If it had done so, as we have already seen, it would be repugnant to the letter and spirit of the constitution.

There is another question disclosed by the record, although not raised by the respondent, which is decisive of the case, and that is that the legislature had no power to prefer the articles of impeachment against the respondent, and that this court has no jurisdiction to try the accusations made against him. William Leese, when the impeachment articles were adopted, was not an officer of the state. He had ceased to be attorney general more than two years prior to that time, by reason of the expiration of the term for which he had been elected. Therefore, for the reasons stated in the opinion in the cases of *State* v. *Hill*, 37 Neb. 80, filed herewith, the respondent was not liable to impeachment for any misdemeanors in office which he may have committed while he was attorney general. The proceedings against him are, for that reason, dismissed.

The other judges concur.

In *State* v. *Hill*, 37 Neb. 80, it appeared that on the sixth day of April, 1893, articles of impeachment against John E. Hill, ex-state treasurer, for misdemeanors in office, alleged to have been committed by him while state treasurer, were adopted by the legislature. These articles of impeachment were presented to and filed in the supreme court, April 10, 1893. The respondent filed a plea to the jurisdiction of the court on the ground that his term of office expired and that his successor took office January 14, 1893; that when the articles of impeachment were presented against him he was, and still is, a private citizen and not subject to impeachment. The only provision of the Nebraska constitution relating to parties liable to impeachment provides that "all civil officers of the state shall be liable to impeachment for any misdemeanor in office": Neb. Const., sec. 5, art. 5. The supreme court, in deciding the case, said:

"The question presented for our investigation is this: Should the pleas to the jurisdiction be sustained? The proposition stated in a different form is: Has the legislature the power to prefer articles of impeachment against a person after his term of office has expired, he, at the time of such impeachment, being a private citizen and not an officer of the state? The question is now, for the first time, submitted to this court for its consideration and judgment."

"The constitution does not, in express terms, say that a private citizen can be impeached, nor does it contain words from which such an inference can be drawn. On the other hand, it is plain that the legislature has no power to impeach a person who has never held any public office in this state. It is civil officers who are amenable to impeachment. Section 5, article 5, so declares. None others were intended to be included by the framers of the constitution. This is clearly manifest from the language of the instrument."

"We see no escape from the conclusion in this state, under the provisions of our constitution, that the power of impeachment extends exclusively to public officials. Where there has been no official guilt the remedy by impeachment will not lie.

"It is urged by counsel for the managers that ex-officers are liable to impeachment for official misdemeanors committed while in office; that jurisdiction attaches immediately upon the commission of an impeachable offense, and that the expiration of the official term does not deprive the legislature of the power to impeach, or the court to try.

"It cannot be said that there is any provision of the constitution which expressly confers the authority to impeach a person after he is out of office, while section 5, already quoted, designates the persons who may be impeached as 'all civil officers of this state.' This language is unambiguous. It means existing officers—persons in office at the time they are impeached. Ex-officials are not civil officers within the meaning of the constitution. Jurisdiction to impeach attaches at the time the offense is committed, and continues during the time the offender remains in office, but not longer."

"But independent of authorities or precedents, if we do not misconceive the meaning of the constitution, there is no room for doubt that ex-officials are not impeachable, since civil officers alone are enumerated in that instrument as subject to that remedy. The term 'officer' cannot properly be applied to a person who is not, at the time, in the holding of an office. When a person ceases to hold an office he immediately becomes a private citizen."

"At the argument our attention was called by counsel for the managers to sections 8 and 9 of chapter 19 of the Compiled Statutes of 1891, which read as follows:

"SEC. 8. An impeachment of any state officer shall be tried, notwithstanding such officer may have resigned his office, or his term of office has expired; and if the accused person be found guilty, judgment of removal from office or disqualifying such officer from holding or enjoying any office of honor, profit, or trust in the state, or both, may be rendered as in other cases.

"SEC. 9. An impeachment against any state officer shall be tried and judgment of removal from office, or of disqualification to hold office, may be rendered, notwithstanding the offense for which such officer is tried occurred during a term of office immediately preceding."

The contention of counsel is that the foregoing provisions not only grant the power to try, but to prefer charges of impeachment against a person who has held office, after the expiration of his term. We are not aware of any rule governing the construction of statutes which would justify such an interpretation. The sections quoted have reference to the trial of an impeachment and the code defines a trial to be "a judicial examination of the issues, whether of law or of fact, in an action": Code, sec. 279. The trial of a criminal case does not include the returning of an indictment by the grand jury or the filing of an information by the county attorney. The trial of a civil suit does not embrace the filing of a petition or other pleadings or the issuance of a summons; so when the statute declares that "an impeachment of any state officer shall be tried," it means what it says and nothing else. The meaning of section 8 is that where a state officer has been impeached during his term he shall be tried, and, if found guilty, judgment shall be rendered, even though he may have resigned, or his term of office has expired after the articles of impeachment were exhibited against him. To hold that it confers power upon the legislature to prefer charges after the resignation of the officer, or the expiration of his term, would be a strained and unnatural construction of the language employed. The statute does not say that a person may be impeached after he has resigned, or his term of office has expired, nor does it contain words which can reasonably be said to warrant such an interpretation. Section 9 provides for the trial of an impeachment of a state officer for an offense occurring during his term of office immediately preceding. It contemplates that the impeachment proceedings shall be commenced while the offender is yet in office.

The respondent being out of office at the time the proceedings for his impeachment were instituted, the legislature has no power to impeach him, and this court has no jurisdiction to try him. The proceedings are therefore dismissed.

BANK OF COMMERCE *v.* HART.

[37 NEBRASKA, 197.]

BANKS AND BANKING—POWER OF OFFICER.—The cashier of a bank has, by virtue of his office, no authority to accept the stock of an insurance or other corporation in payment of a debt due the bank.

CORPORATIONS—POWER TO PURCHASE STOCK IN ANOTHER CORPORATION.—A banking or other corporation has no power to purchase stock in an insurance or other corporation, unless expressly authorized by statute.

CORPORATIONS—INVESTMENT OF FUNDS OF.—The power of the officers of a banking or other corporation in dealing with, or investing the funds of, its stockholders is limited to the purposes for which the incorporation is incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.

John L. Webster, for the appellant.

J. M. Woolworth, for the respondent.

198 RAGAN, C. The Bank of Commerce sued Hart on a note for twenty thousand dollars, executed and delivered by him to the bank. The defense of Hart, so far as the same is material here, was, that on March 30, 1888, he paid on said note fourteen thousand one hundred and five dollars and forty-six cents, with which payment the bank has not credited him. Hart claims to have made this payment by the sale of certain shares of stock in an insurance company to the bank through one Johnson, its cashier, who promised at the time to credit the note when it should be returned from New York, where it then was. The bank claims that the sale of said stock, if made, was to Johnson individually, and not to the bank; that it had no interest or part in said sale; that the same, if made, was without its knowledge or consent; and the purchase of the stock by its cashier, if made for the bank, was in excess of his authority, and void. The jury, by its verdict, allowed Hart the credit he claimed, thus, in effect, finding that the purchase of the insurance stock was made by the bank. Assuming, for the purposes of this opinion, that the evidence in the record supports this finding, we then proceed to inquire whether the cashier exceeded his authority in using funds of the bank in the purchase of this stock.

In *Sandy River Bank* v. *Merchants' etc. Bank*, 1 Biss. 146, the facts were: The cashier of the Mechanics' Bank settled an account of twenty-two thousand dollars with the cashier of the Sandy River Bank, by paying ten thousand dollars cash and giving twelve thousand dollars private paper, which the cashier

of the [199] Sandy River Bank accepted in payment, and gave a receipt in full. The Sandy River Bank brought its action against the Merchants and Mechanics' Bank on the account. The latter pleaded payment by the contract with the cashier. The question in the case was whether the cashier had authority to receive in payment any thing but money. In the course of the opinion delivered the judge said: "A cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act according to the general usage, practice, and course of business, and all acts done by him within the scope of such usage, practice, and course of business bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed without proof, and merely from his office, that he is authorized to receipt and discharge debts, and deliver up securities on payment or discharge of the debt for which they are held. But still his authority is a limited authority, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills, or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof. As a general rule a jury have not a right to infer that the cashier of a bank, as such, has the authority to compromise and discharge debts without payment or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must be established by the particular usage, or practice, or mode of doing business of the bank; or it must be ratified or acquiesced in by the bank in order to be binding."

In *United States* v. *City Bank of Columbus*, 21 How. 356, the facts were: The cashier of the Columbus bank gave to one of its directors, Miner, a letter to the secretary [200] of the treasury of the United States, to the effect that Miner had authority to contract in behalf of the bank for the transfer of money for the government. Relying upon this letter the secretary of the treasury made a contract with Miner for him to transfer one hundred thousand dollars of the government's money from New York to New Orleans. Miner received the money, but never delivered it. The United States brought suit against the Columbus bank to recover the money. The

supreme court of the United States decided that the action could not be successfully maintained, as the cashier of the Columbus bank had no authority to make such a contract, and there was no proof that the board of directors had authorized it. In the course of the opinion Justice Swayne said: "The court defines a cashier of a bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. The term 'ordinary business,' with direct reference to the duties of cashiers of banks, occurs frequently in reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary."

The power of this bank to purchase stock in an insurance company, if it exists at all, is an extraordinary power, and one not confided to the cashier, but belonging to the directory.

In *Bank of Healdsburg* v. *Bailhache*, 65 Cal. 329, [201] it is said that the power to make a settlement of defalcation to a bank, and accept a deed of real estate in satisfaction and release, is the function of the board of directors, and not of any individual director or officer.

It has also been decided that, in the absence of special authority, the cashier of a bank could not release the surety from a note owned by the bank: *Merchants' Bank* v. *Rudolf*, 5 Neb. 527; *Cochecho Nat. Bank* v. *Haskell*, 51 N. H. 116; 12 Am. Rep. 67. That in the absence of special authority or established usage the cashier has no power to compromise claims due his bank: *Chemical Nat. Bank* v. *Kohner*, 8 Daly, 530. That he had no authority to bind his bank by issuing a certificate of deposit to himself: *Lee* v. *Smith*, 84 Mo. 304; 54 Am. Rep. 101. Nor bind the bank by an official indorsement of his own note: *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S. 557.

The cashier of the Bank of Commerce, then, as the executive officer of the bank, was clothed with authority to collect all debts due the bank, but this means collections in money. If a cashier may discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company or a gas company, then he can, under the name and charter of the bank, conduct an entirely different business, and use the funds of his stockholders for a purpose for which they were never subscribed, and in violation of the law of the bank's creation. The purposes for which the Bank of Commerce was organized, as expressed in its articles of incorporation, were to receive deposits of money, and pay the same out on proper vouchers; to loan money on personal security; to issue drafts or letters of credit; to buy and sell securities of every kind, and do a general banking business. Had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies, and deal generally in stocks of other corporations, such a provision would have been [203] contrary to the laws of the state, and void. But there is no provision in the bank's charter which, by any reasonable construction, can be construed into an authority to purchase and hold the stocks of any other corporation. True, it says "to purchase securities of every kind," but certificates of stock are not securities within the meaning of this provision, nor such as the word imports in commercial or banking phraseology. "Securities," as here used, mean notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. We conclude, therefore, that the cashier, by virtue of his office, had not the power to accept the stock of the insurance company in payment of the debt due the bank, but that power, if it existed, was lodged in the directory, and as it had not expressly authorized the cashier thereto, he exceeded his powers in agreeing to accept, on behalf of his principal, the insurance company stock in payment of the debt due from Hart to the bank, and that the latter is not bound thereby.

The next inquiry is as to the powers of the directory to ratify the purchase of the insurance company's stock and bind the bank thereby.

In *Mechanics' etc. Building Assn.* v. *Meriden Agency Co.*, 24 Conn. 159, it is said: "The first question is, whether the defendants, being a joint-stock corporation, organized for a specific purpose, had power to become a stockholder in the

association of the plaintiffs. The purpose for which the agency company united, as expressed in their articles of association, was to do a general insurance agency, commission, and brokerage business, and such other things as were incidental to, and necessary in, the management of that business. So far as that business was concerned, the proper officers of the company had power to act, and bind the company; but if they departed from that business, and entered into contracts not authorized by [203] the company, such contracts would not be binding. A subscription to the stock of a building association has no legitimate connection with the business of an insurance agent, commission merchant, or broker, and was not therefore authorized by the defendants' articles of association. But when the directors of the company subscribed for stock in a building association, whatever may have been their motive, ... they transcended the powers conferred upon them, and departed from the legitimate business of the company."

In *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9, it is said: "If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow, and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible."

In Cook on Stocks and Stockholders, section 816, it is said: "A banking corporation has, at common law, no power to purchase or invest in the stock of another corporation, whether that other corporation be itself a bank or of a different business. The bank is organized for the purpose of receiving deposits and loaning money, not for the purpose of dealing in stocks. Any attempt to engage in such transaction is a violation of its charter rights and of its duty towards the stockholders and the public."

In *Nassau Bank* v. *Jones*, 95 N. Y. 115, 47 Am. Rep. 14, Chief Justice Ruger said: "The question involved in this case is the right of a banking corporation, chartered under the laws of this state, to subscribe for the stock of a

railroad corporation. It is clear that a banking corporation cannot enter into a contract of this character, unless it [204] has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which such stockholders are subject. The plaintiff is a moneyed corporation organized under chapter 260 of the laws of 1838, and authorized by that statute 'to carry on the business of banking, by discounting bills, notes, and other evidences of debts; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, and by loaning money on real and personal property.' The legislature intended by the act in question to inaugurate in this state an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure and solvent depositaries for the custody of such moneys as were needed for current use by the business public. The language employed in the act excludes, by necessary implication, the capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those especially pointed out by the statute. The spirit of the law, as well as a sound public policy, forbid these institutions from risking moneys intrusted to their care in doubtful speculations or enterprises. For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation."

The learned judge who presided at the trial below charged the jury as follows:

"(*a*) In investigating the question as to how far, if at all, the bank was bound by the acts of Johnson in the premises, you will be governed entirely by the testimony which has been adduced before you on the trial. If you shall [205] find from the testimony either that Johnson, in his negotiations with Hart, and his final agreement with him for the purchase of the shares of stock in the insurance company, was acting under authority conferred upon him in that behalf by the board of directors of the bank, or that, subsequently to the transaction, the directors approved and

ratified what had been done by Johnson, acting in his capacity as cashier of the bank, if you shall find that in such transaction he did act as such cashier, and accepted the fruits of such transaction, then, and in that case, the bank would be estopped to deny the authority of Johnson in the premises, and would be bound by his acts in that behalf.

"(*b*) If, on the other hand, you shall find from the testimony that Johnson did not have authority from the board of directors of the bank to negotiate for and purchase the shares of stock in the insurance company referred to in the testimony, and that the directors did not subsequently approve and ratify the acts of Johnson relating thereto, nor accept and retain the fruits of such negotiation and purchase, then, and in that case, the bank would not be bound by what Johnson did relating to such negotiation and purchase, and in such case the plaintiff would be entitled to your verdict for the amount of the note sued on and interest."

This charge proceeded upon the theory that though the purchase of the insurance company's stock by the cashier was unauthorized, yet the board of directors could have afterwards ratified and adopted it and bound the bank by it. We do not assent to this doctrine as applied to this case. It is doubtless true that the bank could legally take the stock of another corporation as security for a debt previously contracted. Possibly it might make a loan on the strength of the stock as security at the time. On this point the authorities are not in harmony, and as it is not material here we do not decide it. An emergency might arise when a bank's board of directors would be justified in taking the [206] stock of another corporation in settlement, adjustment, or compromise of a doubtful claim or debt, acting in the honest belief that only by so doing could a serious loss to the bank be averted. None of these reasons, however, existed in the case at bar, or if they did the record before us does not disclose them. The cashier had no authority to bind the bank by buying the insurance company's stock. The board of directors had no authority to authorize him to do so; and, if the cashier bought such stock in behalf of the bank, the directory had no authority to ratify the purchase and thus bind the bank. But assuming the charge states the law correctly, there is no evidence in the record that the board of directors ever authorized the cashier to purchase the insurance stock, and none that the board of directors ever ratified

such a purchase, if made, or that the bank accepted the fruits of the transaction, and the jury could not, from the evidence, so find either. We conclude, then, that the powers of a directory of a bank in dealing with and in investing the funds of the stockholders are limited to the purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.

We are constrained to say that the verdict of the jury is not supported by the evidence, and that the judgment of the court is contrary to the law of the case. The judgment of the district court is therefore reversed and the case remanded for further proceedings.

The other commissioners concurred.

CORPORATIONS—PURCHASING STOCK IN ANOTHER CORPORATION.—One corporation cannot subscribe to the capital stock of another corporation: *Denny Hotel Co. v. Schram*, 6 Wash. 134; 36 Am. St. Rep. 130, and extended note where the questions involved in the principal case are discussed.

CORPORATIONS—TAKING STOCK IN ANOTHER CORPORATION IN PAYMENT OF DEBT.—A corporation may take the stock of another corporation in payment of a debt or as security for the same: *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319, and note; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590.

O'CONNOR *v.* WALTER.

[37 NEBRASKA, 267.]

EXEMPTIONS—WAGES—GARNISHMENT—CONFLICT OF LAWS.—An assignee of a claim against a resident of one state employed by a railway company operating its road through that and another state, to a resident of the latter state, for the purpose of obtaining, by garnishing the company in the latter state, wages due the debtor and exempt by the law of the former state, and so obtained, is liable to the debtor in the state of his residence for the amount so appropriated without his consent.

EXEMPTIONS—GARNISHMENT—CONFLICT OF LAWS—ESTOPPEL.—A judgment in one state garnishing exempt wages of a resident of another state in favor of an assignee of the claim does not estop the debtor from bringing an action in the latter state against the assignee to recover the amount of such judgment.

Sawyer and Snell, for the appellant.

A. G. Greenlee, for the respondent.

268 RYAN, C. The petition of Fred Walter, plaintiff, alleged, as against Patrick W. O'Connor, as defendant, that for a long time prior to the fifth day of March, 1889, the

said plaintiff was, and ever since had been, a married man, the head of a family, and a resident of Cass county, Nebraska, and that during the whole of said time the said plaintiff had lived with and provided for his family by day labor, in the employ of the Chicago, Burlington, and Quincy Railroad Company, and that said plaintiff's sole income and means of support for himself and his family were the wages by plaintiff earned in said employment; that on March 5, 1889, one D. M. West filed a petition in the court of N. Schurz, a justice of the peace in the city of Council Bluffs, Iowa, claiming to be the assignee of said O'Connor of a claim against plaintiff for the sum of $13.50 and costs; that said West caused the Chicago, Burlington, and Quincy Railroad Company to be garnished, and requiring said railroad company to answer as to the indebtedness of the said company to plaintiff; that on March 11, 1889, the said railroad company accordingly answered that it was indebted to said Walter in the sum of $55, whereupon said cause was continued and service was obtained by publication upon Walter, and the day for hearing was set for May 10, 1889; that in April, 1889, the said railroad company filed an affidavit of the said Walter that he was the head of a family, and that his wages were exempt from execution, and asking that said proceedings be dissolved; that nevertheless the said justice of the peace entered judgment [269] against plaintiff Walter for the sum of $13.50 damages and costs taxed at $8.60, and requiring said railroad company to pay into court the sum of $22.10 out of plaintiff's wages, which said railroad company thereupon did; and that said $22.10 was deducted by said railroad company from the sum of $55 due plaintiff, and that the plaintiff has never received said sum so deducted; that said sum of $55 was due plaintiff for labor performed as a brakeman by plaintiff for said railroad company within the sixty days immediately preceding said date of garnishment, and that the wages so garnished were exempt from seizure by attachment, execution, or garnishee process in this state, which facts the said West and O'Connor also well knew; that said West was not the owner of the account of the said O'Connor (if any such he had), but held it simply for collection for O'Connor, who was the real party in interest, though a pretended assignment thereof had been made by O'Connor to said West. For a second cause of action plaintiff claimed to be entitled to $27.50 as damages indirectly resulting from said

garnishment, which he alleged was simply a conspiracy between West and O'Connor to deprive plaintiff of his exemptions under the laws of Nebraska. There was an answer in denial of each of the above averments.

The allegations of the petition are set out at great length and with considerable particularity, for the reason that with the exception of the averments in respect to the second cause of action, each allegation of said petition was, upon the trial, fully sustained by the proofs. These allegations, therefore, fairly state the facts in this case, wherefore it is needless that they be repeated. It was stipulated between the parties in the district court that by the laws of the state of Iowa the wages of a nonresident of that state are not exempt from attachment, execution, or garnishment. Upon a trial of the issues, the jury returned a verdict in favor of Walter, against Patrick W. O'Connor, [370] for $24.50, for which, with costs, judgment was duly rendered. For the reversal of this judgment O'Connor brings this cause to this court by his petition in error, with the necessary record and bill of exceptions.

In *Albrecht* v. *Treitschke*, 17 Neb. 205, this court held that "where a judgment creditor procures the exempt wages due to a laborer to be taken by garnishee process and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor." The statute exempting from seizure, by judicial process, such earnings of a laboring man as have accrued within the period of sixty days immediately preceding service of garnishment process was intended for the support of the family of which such laborer is the head and stay. In extending credit, every one dealing with the head of a family must take into account this right of exemption, and presumably in every extension of credit this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this as for any other act of misappropriation.

From the facts which we have under consideration it appears that O'Connor assigned his claim to West solely for the purpose of collection. In his evidence O'Connor admitted this, at the same time stating that the arrangement was that West was to receive for making the collection twenty per cent

of the amount thereof. It is true the court in which suit was brought by West had jurisdiction of the garnishee, which operated its line of railroad as well in Iowa as Nebraska, and that therefore the amount was lost to Walter beyond recovery as against the garnishee: *Chicago etc. R. R. Co.* v. *Moore*, 31 Neb. 629; 28 Am. St. Rep. 534. But why should this operate in favor of O'Connor, who was the [271] prime mover in this garnishment proceeding? In all respects the deprivation of this exemption was as harsh and effectual as in the case of *Albrecht* v. *Treitschke*, 17 Neb. 205. Let us suppose the exemption was of a specific article of personal property. It would be unquestioned that if he appropriated it to his own use in this state O'Connor would be liable to Walter for its value. Instead of its being appropriated in this state let us suppose that this property was found and appropriated by O'Connor in Iowa, would his liability for its value in the courts of Nebraska be in any way modified by that fact? Would it at all relieve of liability for him to show that his duly authorized agent in Iowa converted the property to the use of O'Connor? Certainly not; and there is no appreciable difference in principle between the cases supposed and that at bar. If the judgment creditor, directly or indirectly, no matter where or by what process, appropriates to the payment of a debt due him the exempt wages of the debtor, without such debtor's consent, such creditor is liable to the debtor entitled to such exemption to the full amount of the misappropriation. In this case, however, it was urged that the judgment of the Iowa court was *res adjudicata*, and therefore unassailable. An estoppel of that, as well as of any other nature, requires mutuality between the parties to render it effective. If O'Connor is entitled to the benefit of the judgment pleaded, it must appear that a judgment against him would have been likewise binding. This could not have been, for, purposely, he was not a party to the Iowa proceeding in any way. Under the proofs no other verdict could properly have been returned than that which was rendered, and the judgment of the district court is affirmed.

The other commissioners concurred.

Garnishment in One State of Debt Exempt in Another.—A creditor who is a citizen of one state cannot, by assigning his claim to a citizen of another state, use the courts of that state to collect a debt against a citizen of the former state whose person is not within the jurisdiction where suit is brought, and whose wages, sought to be reached by garnishment, are

exempt from seizure by the law of his state: *Drake* v. *Lake Shore etc. Ry. Co.*, 69 Mich. 168; 13 Am. St. Rep. 382, and note. Wages due and payable in this state to the employee of a railway doing business here, and here exempt from execution, cannot be garnished in another state so as to defeat the exemption laws of this state: *Illinois Cent. R. R. Co.* v. *Smith*, 70 Miss. 344; 35 Am. St. Rep. 651, and note. When the wages of a nonresident debtor, earned and payable in another state, are sought to be garnished in Illinois, the exemption law of that state, and not the state of the debtor's domicile, will control in the absence of a statute to the contrary: *Wabash R. R. Co.* v. *Dongan*, 142 Ill. 248; 34 Am. St. Rep. 74, and note. See on this subject, the extended note to *Missouri Pac. Ry. Co.* v. *Shariff*, 19 Am. St. Rep. 145.

PACIFIC TELEGRAPH COMPANY *v.* UNDERWOOD.

[37 NEBRASKA, 815.]

TELEGRAPH COMPANIES—EVIDENCE.—PRINTED MATTER ON TELEGRAPH BLANKS is no part of the message sent, and the written part of the telegram is admissible in evidence without putting in the printed matter on the blank.

TELEGRAPH COMPANIES—RIGHT TO LIMIT LIABILITY.—A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot, by contract, limit or exempt itself from liability for its own negligence.

TELEGRAPH COMPANIES—PRINTED CONDITIONS ON TELEGRAPH BLANKS—EFFECT OF.—A condition printed on a telegraph blank, providing that the company cannot be held liable for damages unless the claim is presented in writing within sixty days is unreasonable and without consideration if viewed as a contract between the telegraph company and the sender of the message, and void as an attempt on the part of the company to limit its liability for its negligence by enacting for itself a statute of limitations.

Marquett, Dewease, and Hall, for the appellant.

Charles E. Magoon, for the respondent.

816 RAGAN, C. John L. Underwood sued the Pacific Telegraph Company in the district court of Lancaster county. The facts involved in the case are substantially: Underwood lived in Lincoln, Nebraska. He had some household goods in Richmond, Indiana. He desired these shipped to Lincoln, and wrote to one Lawrence at Richmond, asking the rate on goods. Lawrence delivered to a telegraph company at Richmond the following dispatch:

"RICHMOND, INDIANA, July 2, 1886.

"*To John I. Underwood, Lincoln, Nebraska:* Rate seventy-six dollars per car; $1.09 per hundred, local.

"L. L. LAWRENCE."

This telegram when delivered to Underwood read:

"RICHMOND, INDIANA, July 2, 1886.

"*To John I. Underwood, Lincoln, Nebraska:* Rate twenty-six dollars per car; $1.09 per hundred, local.

"L. L. LAWRENCE."

Underwood, relying upon the correctness of this telegram as delivered, ordered his goods shipped as a car lot, and on their arrival at Lincoln was obliged to pay seventy-six dollars freight. He brought this suit to recover the difference between the seventy-six dollars and twenty-six dollars.

The telegraph company defended on three grounds: 1. That the mistake in the telegram was made on another line; 2. That Underwood did not present his claim for damages to the telegraph company within sixty days after the date of the telegram; 3. That Underwood was not damaged by the mistake.

There was a verdict and judgment for Underwood, and the telegraph company brings the case here for review.

The first error assigned is that the court erred in admitting in evidence the telegram as it originally started from [317] Richmond, for the reason that it is a different one from that set out in the petition. On looking into the record we find that Underwood claims that the telegraph company delivered to him a telegram which read "twenty-six dollars per car," but he avers that this telegram, as originally sent, read "seventy-six dollars per car," and that through the negligence of the telegraph company it was altered. The principal objection, however, is that Underwood, on the trial to the jury, put in evidence only the written part of the telegram without putting in the printed matter on the blank. The printed matter alluded to was that usually found on all telegraph blanks, and contains, amongst other conditions and terms, this: "This company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The telegraph company did not undertake that the printed conditions on the telegraph blank should be transmitted. These conditions were no part of the message sent. The evidence corresponded with the pleadings, was competent, and there was no error in its admission.

The second error alleged is the refusal of the court to give the jury this instruction: "If the jury find from the evidence

that the telegraphic blank on which was written the message received by the plaintiff from the defendant contained a clause or a provision to the effect that the company will not hold itself liable for errors or delay in transmission or delivery of unrepeated messages in any case where the claim is not presented in writing within sixty days after the sending of the message, then, before the plaintiff can recover, he must show that he presented his claim to the defendant in writing within sixty days after receiving the message, and if the jury find from the evidence that the plaintiff did not so present his claim in writing within sixty days after the sending of the telegram, then the defendant is not liable, and the plaintiff cannot recover, and your verdict should be for the defendant."

[518] There are four reasons why the refusal of the court to give this instruction was correct:

(*a*) This suit is not based on a contract, but is grounded in tort.

(*b*) A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot by contract exempt itself from liability for its own negligence.

(*c*) The clause printed on the telegraph blank, to the effect that the telegraph company would not be liable for damages in any case, unless the claim was presented in writing in sixty days, was and is unreasonable and wholly without consideration if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. If it can make its liability for negligence depend on notice of claim being given in sixty days it may make it six days. If liability can be made to depend upon the notice being in writing it can limit it to pen and ink. The laws of this commonwealth are for the protection and government of corporations and individuals alike, and all citizens should transact their business with reference to these laws. The attempt so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court: See on this subject, *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Western Union Tel. Co.* v. *Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; *Gillis* v. *Western Union Tel. Co.*, 61 Vt. 461; 15 Am. St. Rep.

917, and cases there cited; *Johnson* v. *Western Union Tel. Co.*, 33 Fed. Rep. 362; *Western Union Tel. Co.* v. *Longwill*, New Mex., March 21, 1889.

(*d*) The instruction asked was violative of the statute of the state. "Any telegraph company engaged in the transmission of telegraphic [819] dispatches is hereby declared to be liable for the nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law; and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks": Comp. Stats., c. 89 *a*, sec. 12.

The third contention of the plaintiff in error is that the mistake in the telegram was made by the Pacific Mutual Telegraph Company, and the jury erred in not so finding. Whether this was so was entirely a question of fact for the jury, and was properly submitted to them, and at the request of the plaintiff in error they were instructed on the subject as follows: "The jury are instructed that the defendant in this case is not liable for any errors or mistakes made on their connecting telegraph lines, and if the jury find from the evidence that the error or mistake complained of in the telegram was made on other lines before it came onto the line of the defendant, and you find that the message was transmitted by the defendant from the point where the message came to the defendant to its place of destination in the same form that it was received, then the defendant has not been guilty of negligence, is not liable, and you should find for the defendant." The jury said by their verdict that the defense was not made out. They were clothed by law with the duty of weighing the evidence and determining, and we cannot say they came to a wrong conclusion.

Finally, it is insisted that Underwood suffered no damage by reason of the mistake made in the dispatch. On looking into the record we find that the evidence is that Underwood's goods weighed about two thousand pounds; at one dollar and nine cents per hundred, local, the freight would have been twenty-one dollars and eighty cents. The testimony further shows that he would not have shipped them as a carload had he known that the [820] rate was seventy-six dollars instead of twenty-six dollars. It would thus appear that in any event

Underwood was damaged fifty-four dollars and twenty cents. There is no error in the judgment of the district court, and the same is affirmed.

The other commissioners concurred.

TELEGRAPH COMPANIES—WHETHER COMMON CARRIERS.—Telegraph companies are common carriers, and are bound to act when called upon, their charges being paid or tendered. The extent of their liability is to transmit correctly the message as delivered: *Western Union Tel. Co.* v. *Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *Parks* v. *Alta California Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589, and note. Telegraph companies are not common carriers in the strict sense of the term, although engaged in a public employment, and bound to transmit for all persons messages presented to them for that purpose: *Fowler* v. *Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211, and note. Telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission or the prompt delivery of messages. They are liable, however, for losses consequent upon their negligence: *Western Union Tel. Co.* v. *Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630. A telegraph company is not a common carrier, but a bailee: *Birney* v. *New York etc. Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607, and note at pages 613, 617. A telegraph company is not a common carrier, and is liable only for proper care and attention: *Leonard* v. *New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446.

TELEGRAPH COMPANIES—LIMITING LIABILITY FOR NEGLIGENCE.—A telegraph company cannot provide by contract against liability for negligence in any degree: *Brown* v. *Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 793, and note with the cases collected; *Western Union Tel. Co.* v. *Hearne*, 77 Tex. 83. See, also, the extended notes to *True* v. *International Tel. Co.*, 11 Am. Rep. 168; *Birney* v. *New York etc. Tel. Co.*, 81 Am. Dec. 612; and *Camp* v. *Western Union Tel. Co.*, 71 Am. Dec. 463.

TELEGRAPH COMPANIES—CONDITION LIMITING TIME FOR PRESENTATION OF CLAIM.—A stipulation by a railroad company that it will not be liable unless a claim for damages is presented within sixty days from the time the message is sent is reasonable, and will be enforced: *Western Union Tel. Co.* v. *Dougherty*, 54 Ark. 221; 26 Am. St. Rep. 33, and note, with the cases collected. To the same effect, see *Hill* v. *Western Union Tel. Co.*, 85 Ga. 425; 21 Am. St. Rep. 166, and note, and *Sherrill* v. *Western Union Tel. Co.*, 109 N. C. 527.

JANES *v.* HOWELL.

[37 NEBRASKA, 220.]

JUDGMENTS—EQUITABLE RELIEF AGAINST.—A court of equity cannot vacate a judgment at law merely on the ground that the process in the suit in which such judgment was rendered was not served on the defendant as shown by the officer's return. In such case the judgment defendant must, in order to obtain relief, allege and prove that he had a meritorious defense to the action at law.

Cornish and Robertson, for the appellants.

Brown and Talbott, for the respondents.

220 RAGAN, C. On January 8, 1889, the appellants recovered judgment against the appellees in the county court of Douglas county. The return of the summons in the case is as follows:

"On December 27, 1888, I received this writ, and on December 27, 1888, I served it by leaving a certified copy of this writ and indorsements thereon at the usual place of residence of O. F. Janes and M. E. Janes, the defendants, in 221 Douglas county, Nebraska. GEORGE KARLL, Constable."

The record of the judgment in the county court recites: "This cause came on for trial to the court; defendants did not appear. It appearing to the court that said defendants had been duly served with summons and came not, default was made," etc. On June 3, 1889, the appellees filed in the district court of Douglas county their petition in which they alleged the recovery against them in the county court of the aforesaid judgment; that during the month of January, 1889, and for some time previous thereto, they resided in said Douglas county, and that they had no knowledge of the commencement by the said Howell of an action against them, nor of the rendition of a judgment therein, until after the same was rendered. They further aver that no summons issued in the case was served upon them in any way or form known to the law; nor was there any notice of any kind given them, or served on them, or either of them, of the commencement of Howell's action; that they had a good and valid defense thereto; that they had no adequate remedy at law, and prayed that said judgment in favor of said Howell might be set aside and held for naught, and that all the proceedings had thereunder might be set aside and annulled. The district court by its decree vacated the judgment and the appellants bring the case here.

The decree will have to be reversed for the reason that there is neither pleading nor proof on the part of the appellees that they have any valid defense to the claim on which appellants' judgment is based. The petition does state that they, the appellees, "have a valid defense," but this is a mere conclusion. The plea, to be good in this respect, must set out what the defense is, state the facts, so that the court can determine whether the facts constitute a defense.

While there is some conflict the weight of authority undoubtedly is that a court of equity will not enjoin a 222 judgment at law merely on the ground that the process in the suit

in which the judgment was rendered was not served on the defendant, or, in other words, that the return of the officer as to service is, in fact, false. To justify the interposition of a court of equity in such a case it must be further shown that if the relief sought be granted, a different result will be obtained from that already adjudged by the judgment alleged to be void: *Colson* v. *Leitch*, 110 Ill. 504, and cases there cited; 3 Pomeroy's Equity Jurisprudence, sec. 154, and cases there cited. It is, however, the settled law of this state that a court of equity will not set aside a judgment at law regular on its face, when it is not shown that the judgment was rendered when no cause of action existed: *Osborn* v. *Gehr*, 29 Neb. 661.

The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

The other commissioners concurred.

JUDGMENTS—VACATING—FALSE RETURN OF PROCESS.—Judgments founded upon false return of process may be vacated on motion interposed within a reasonable time: *Norton* v. *Atchison etc. R. R. Co.*, 97 Cal. 388; 33 Am. St. Rep. 198, and note, with the cases collected. One against whom a judgment by default has been taken, without service of process, and over whose person the court has acquired no jurisdiction, is entitled to have the judgment set aside whether he has a good defense to the action or not: *Dobbins* v. *McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626; *Magin* v. *Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216, and note. For a further discussion of the question of setting aside judgments based on false return of service see the notes to *Taylor* v. *Lewis*, 19 Am. Dec. 137-139, and *Morrill* v. *Morrill*, 23 Am. St. Rep. 117.

CADWALLADER *v.* MCCLAY.

[37 NEBRASKA, 359.]

JUDGMENTS BY DEFAULT—VACATING FOR FRAUD.—A judgment taken by default after a settlement between the parties, contrary to plaintiff's promise to dismiss the action, relied upon by defendant, may be vacated and set aside, although the judgment plaintiff is an emancipated infant.

JUDGMENTS BY DEFAULT—VACATING IN EQUITY.—A judgment taken by default after settlement between the parties, contrary to plaintiff's promise to dismiss the action, relied upon by defendant, may be vacated and set aside in equity when statutory proceedings are inadequate to afford relief.

J. S. Bishop, and Pound and Burr, for the appellant.

Reese and Gilkeson, for the respondent.

IRVINE, C. Charles T. Weber, an infant, by his father as next friend, recovered a judgment before a justice of the peace in Lancaster county for one hundred and seven dollars

and costs. A transcript of this judgment was filed in the office of the clerk of the district court, and, after certain proceedings in aid of execution, an execution was levied upon real property of Cadwallader occupied by him and his family as a homestead. Before the sale this suit was begun by Cadwallader against the sheriff of Lancaster county and Weber for the purpose of vacating the judgment and enjoining the enforcement thereof. D. L. Love was permitted to intervene as assignee of Weber's judgment.

The plaintiff claimed first that the property levied upon was exempt from execution as a homestead. The defendants met this by showing that the judgment upon which the execution was issued was for wages owed by Cadwallader to Weber, and claimed that a homestead was not exempt from execution upon such a judgment. This question we need not determine in view of the conclusions reached on the other branch of the case.

[561] The plaintiff contended, in support of his application to have the judgment canceled, that pending the action before the justice of the peace, and before judgment was rendered, he had a conference with Weber, in which their accounts were looked over and a settlement reached, by which it was ascertained that Weber's account was overdrawn and that a small balance was due from Weber to plaintiff; that thereupon Weber promised that the suit should be dismissed; that Cadwallader relied upon that promise and did not attend at the time appointed for the hearing, when Weber, in fraud of his agreement, took judgment by default, and this fact was concealed from Cadwallader until too late to open up the judgment or appeal therefrom. The evidence upon this subject was conflicting, and the trial judge was justified in finding the facts for the plaintiff. There can be no doubt that a judgment taken contrary to an agreement of this character, relied upon by the defendant, would be vacated, if taken in the district court, under section 602 of the code. That section does not apply to justices of the peace, and the plaintiff is therefore entitled to proceed in equity to avoid such judgment: See Black on Judgments, sec. 373, and numerous cases there cited. We do not think that the fact that Weber was an infant affects the case. His next friend was his father, and his father had emancipated him, as is clear from the fact that he had been permitted to engage in a contract with the plaintiff on his own behalf, and that his

father undertook as his next friend to prosecute an action to recover his wages for him. He was apparently a young man approaching his majority and accustomed to transacting his own business. Under these facts we think Cadwallader was justified in relying upon Weber's representations and promises. An infant is responsible for frauds committed by him as well as for torts: *Savage* v. *Foster*, 9 Mod. *35; 1 Story's Equity Jurisprudence, 385. As was said in *Binsse* v. *Barker*, 13 N. J. L. 263, 23 Am. Dec. 720, a similar case: "The defendant has been [362] injured by the want of good faith on the part of the plaintiff, and this court will not sustain a judgment under such circumstances." Love, as Weber's assignee, took only Weber's rights.

The briefs discuss a question as to whether the defendants were misled by a statement of the trial judge whereby they were induced to forbear putting upon the stand certain witnesses upon the question of fraud; but the record does not disclose any facts founding this argument, and the affidavit filed in this court cannot take the place of a transcript of the record or bill of exceptions.

Affirmed.

The other commissioners concurred.

JUDGMENTS BY DEFAULT.—VACATING FOR FRAUD: See the extended notes to *Morrill* v. *Morrill*, 23 Am. St. Rep. 106; *Burnham* v. *Hays*, 58 Am. Dec. 393, and *Oliver* v. *Pray*, 19 Am. Dec. 603. If a defendant pays the amount of the plaintiff's demand, and enters into an agreement for the dismissal of the action, and thereafter subpœnas witnesses and causes judgment to be entered against the plaintiff for the costs of procuring them, he is guilty of fraud, and the enforcement of the judgment will be enjoined in equity: *Greenwalult* v. *May*, 127 Ind. 511; 22 Am. St. Rep. 660, and note. A court of equity possesses inherent power to set aside a judgment procured and entered by fraud practiced on the court or for a mistake made by it: *English* v. *Aldrich*, 132 Ind. 500; 32 Am. St. Rep. 270, and note. A court of law may vacate and set aside its judgment when founded in fraud or rendered under circumstances of mistake or surprise such as to entitle the injured party to relief: *Dial* v. *Farrow*, 1 McMull. 292; 36 Am. Dec. 267. When a party is prevented by fraud or false representations from interposing his defense before judgment is rendered against him, he may apply to the court for its annulment and to be let in to defend on the merits: *Ambler* v. *Whipple* 139 Ill. 311; 32 Am. St. Rep. 202, and note.

FIRST NATIONAL BANK OF WYMORE v. MILLER.

[37 NEBRASKA, 500.]

NEGOTIABLE INSTRUMENTS—CHECKS—PRESENTMENT TO CHARGE INDORSER. To charge an indorser of a check it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time depends upon the facts and circumstances of each particular case.

BANKS AND BANKING—CHECKS—PRESENTMENT.—No custom among bankers as to the manner of presenting checks for payment will relieve them from the legal duty of presenting such checks within a reasonable time.

BANKS AND BANKING—CHECKS—PRESENTMENT TO CHARGE INDORSER—WANT OF DILIGENCE.—When a check indorsed in blank is received by a bank in one town, drawn on a bank in another town, a short distance away, the two being connected by telegraph, telephone, and railroad lines, and two daily mails, the failure of the receiving bank or its agent in another city, to whom the check is sent, to present it for payment until five days after it is received, discharges the indorser.

NEGOTIABLE INSTRUMENTS—CHECKS—PRESENTMENT—DILIGENCE REQUIRED. Ordinary checks are not designed for circulation, but for immediate presentment for payment. To charge an indorser, a check must be presented with all dispatch and diligence consistent with the transaction of commercial concerns. Although such checks are like inland bills of exchange, and governed by like principles, greater diligence is required in presenting checks than in presenting such bills.

NEGOTIABLE INSTRUMENTS—PRESENTMENT TO CHARGE INDORSER—DAMAGES.—In an action to charge an indorser of a check, not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the laches in making presentment is immaterial.

A. D. McCandless, and Marquett, Deweese, and Hall, for the appellant.

Griggs, Rinaker, and Bibb and T. F. Burke, for the respondent.

501 RAGAN, C. On Saturday, the thirty-first day of May, 1890, about four o'clock in the afternoon, Abraham L. Miller indorsed in blank and deposited to his credit in the First National Bank of Wymore two checks, drawn by A. W. Beahm to Miller's order, on the state bank of Cortland, Nebraska. These checks aggregated $3,429.25.

The town of Cortland is twenty-seven miles distant from Wymore, the two being connected by telephone, telegraph, and railroad lines, and two daily mails. The mails for Cortland closed at Wymore, at that time, at six and eight o'clock, respectively, in the afternoon of each day. The first mail would reach Cortland at nine o'clock, P. M., of the same day, and the second at ten o'clock the next day.

The plaintiff in error made no inquiry of the Cortland bank as to whether the Beahm checks were good, nor did it notify the Cortland bank that it held such checks. On the same day that the checks were received by it, the sec plaintiff in error sent them by mail to a bank in St. Joseph, Missouri, for collection. That bank forwarded them by mail to the Omaha National Bank, at Omaha, Nebraska, for collection, and the latter sent them by mail to the state bank of Cortland, on which they were drawn. This bank received them on Thursday, the fifth day of June. Beahm being insolvent, they were protested for nonpayment. At the close of business on Saturday, the 31st of May, Beahm had to his credit in the state bank of Cortland, $3,533.76. On the morning of Monday, the second day of June, at the commencement of business, Beahm had to his credit in the state bank of Cortland the sum of $3,533.76, and during the day he deposited $3,200 more to his credit in the same bank. Against this sum the cashier of the Cortland bank had agreed to accept checks of Beahm's amounting to $3,800. On the morning of Tuesday, June 3d, Beahm had to his credit in the Cortland bank, $2,132.65. On the morning of Wednesday, June 4th, he had to his credit a balance in the Cortland bank of $1,621.35, and during the day deposited $500 more. During this day, June 4th, he drew against his deposits in the Cortland bank, so that on Thursday morning, June 5th, he had left to his credit in the Cortland bank the sum of $310.15. After Miller had deposited in plaintiff in error the two Beahm checks he drew against them checks amounting to $2,472.29, which plaintiff in error paid, leaving to his credit a balance of $956.96. The bank having refused to pay him this, he brought this suit to recover it.

The plaintiff in error filed an answer and counterclaim, in and by which it alleges the deposit by Miller in its bank of the Beahm checks; that it forwarded said checks in a reasonable time to the state bank of Cortland, on which they were drawn, but that the checks were worthless and payment was refused for the reason that Beahm had no funds in the Cortland bank with which to pay the same, and that the checks were duly protested; and that on the sec day the checks were deposited it had paid checks of Miller's amounting to $2,482.28, and that subsequently it had collected from the said Beahm $800, and put the same to the credit of Miller, leaving Miller owing the plaintiff in error $1,687.84,

for which sum, with interest and protest fees, it prayed judgment against Miller.

The case was tried to the court, a jury being waived. The court found for the defendant in error, Miller, and rendered judgment against the plaintiff in error for the sum of $956.96, the difference between the Beahm checks and the total of the checks which Miller had drawn on the bank after their deposits, and which the bank had paid.

The bank brings the case here for review, the error alleged being that the findings and judgment of the court below were contrary to the law and evidence.

After a careful and patient examination of this record we have no doubt that the Beahm checks were received by the plaintiff in error as cash, and that they were not received by the plaintiff in error for collection for Miller. This proposition is abundantly supported by the facts and the evidence throughout the entire case. These checks were payable to Miller's order, and by him indorsed and delivered to the plaintiff in error, which gave Miller credit for the amount of them and allowed him to check against them. After these checks were deposited in plaintiff in error by Miller the relation subsisting between the bank and Miller was: 1. That of depositor and depositee; and 2. That of indorser and indorsee.

The plaintiff in error contends, conceding the checks were not presented for payment within a reasonable time, that Miller was not prejudiced by the delay. We do not assent to this as a conclusion of fact. The evidence is: Had plaintiff in error, on the date it received the checks, advised the Cortland bank of the fact that bank would have paid the checks in full. At the opening of business on Monday, June 2d, Beahm had on deposit in the Cortland [504] bank $3,533.76, and during the day he deposited $3,200 more. Against this there was a check of $3,800 that the bank had agreed to accept, which would leave on deposit at the Cortland bank at the close of business on Monday, June 2d, to Beahm's credit, $2,933.76. Had the checks reached Cortland on Tuesday, June 3d, there were $1,186.35 of Beahm's money on deposit there that date. Had they reached the Cortland bank on Wednesday, June 4th, there were in the Cortland bank to Beahm's credit $2,125.35. We do not see, from this evidence, how plaintiff in error can claim that the delay in presenting these checks worked no injury to Miller. But in a suit like this, between the indorsee and indorser of an ordinary check,

is it a material inquiry whether the delay of the indorsee in presenting the check damaged the indorser?

Tiedeman on Commercial Paper, section 442, after stating that the drawer of a check would not be discharged by the failure to present it for payment within a reasonable time, unless the drawer was prejudiced thereby, continues: "The rule is different with regard to indorsers. They are discharged whether they have suffered any damage or not from the failure to make due presentment and give the notice of dishonor within a reasonable time."

In *Northwestern Coal Co.* v. *Bowman*, 69 Iowa, 150, that court say, after deciding that the plaintiff had held the check in question an unreasonable time before presenting it, and that it could not recover against indorsers: "The fact that the drawer had no funds in the hands of the drawee when the check was drawn makes no difference."

In *Gough* v. *Staats*, 13 Wend. 549, the supreme court of New York say: "If there has not been due diligence in presenting the check for payment, the indorser is discharged, although he has not been prejudiced by the delay."

We think these cases state the rule correctly, and that the question as to whether the indorser was damaged by the delay in presenting the Beahm checks for payment was wholly immaterial. The question then is, whether plaintiff in error was guilty of such negligence or laches in the presentment of these checks for payment to the bank on which they were drawn as to release the indorser Miller. The authorities all say that, in order to hold an indorser of a check it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time, depends upon the facts and circumstances of each particular case.

Now, it appears from the evidence in this record that the plaintiff in error was guilty of negligence at the time it received the Beahm checks in not inquiring of the Cortland bank as to whether they would be paid on presentation. It further appears that Cortland is only twenty-seven miles distant from Wymore, plaintiff in error's place of business; that the checks could have been mailed by the plaintiff in error to the Cortland bank the same day they were received, and they would have reached the Cortland bank, at the furthest, on Monday at ten o'clock in the forenoon. The plaintiff in error could have mailed the checks on Monday and they would have reached the Cortland bank on Tuesday

at ten o'clock, A. M. Instead of this the plaintiff in error chose to mail these checks to St. Joseph, Missouri, and they go around by way of Omaha and then back to Cortland. It is also in evidence in this record, from the mouths of experienced bankers, that due diligence in the presentment of these Beahm checks to the Cortland bank required that the plaintiff in error should send them by the first mail to the Cortland bank, and the evidence does not establish the contention of the plaintiff in error that these checks were presented for collection to the Cortland bank under any custom of bankers. And if it did we do not think that bankers, by any custom, can evade their legal duties. We think, therefore, that the plaintiff in error did not use such diligence in the presentment of these Beahm checks for payment as to hold the indorser, Miller, thereon.

See In *Smith* v. *Janes*, 20 Wend. 192, 32 Am. Dec. 527, the supreme court of New York say: "The holder of a check can recover against the indorser only when he has used due diligence in presenting or giving notice of demand and nonpayment. Where the parties all reside in the same place the check should be presented on the day it is received or on the following day; and when payable at a different place from that in which it is negotiated it should be forwarded by the mail on the same or the next succeeding day for presentment": See, also, *Holmes* v. *Roe*, 62 Mich. 199; 4 Am. St. Rep. 844.

In *Mohawk Bank* v. *Broderick*, 10 Wend. 304, the supreme court of New York say: "A check on a bank for the payment of money, to charge an indorser, must be presented with all dispatch and diligence consistent with the transaction of other commercial concerns, and it was accordingly held, where a check was received in Schenectady on the 14th of January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th of February, that laches was imputable to the holder, and that the indorser was discharged. Although it is said that checks are like inland bills of exchange, and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange." This case was affirmed by the court for the correction of errors in 13 Wend. 133; 27 Am. Dec. 192. See to the same effect *Northwestern Coal Co.* v. *Bowman*, 69 Iowa, 150.

county. It should be observed that no objection [538] is made to the record of the decree sought to be impeached. The district court of Fillmore county certainly had jurisdiction of the subject of the action, and had acquired jurisdiction of the defendant therein in the manner prescribed by law. The decree of divorce is therefore not void in the sense that it can be assailed in a strictly collateral proceeding. A judgment or decree stands upon the same footing as any other advantage procured by fraud. It is voidable only at the election of the injured party, and not absolutely void: Black on Judgments, 170. It is but fair to add that there does not appear to be any difference of opinion between plaintiff's counsel and the court upon that proposition. The action to vacate and annul the decree is a recognition of its present conclusiveness. The question under consideration involves two inquiries, viz: 1. Is the right to vacate judgments and decrees therein included within the general equity powers of the district court, or is the remedy provided by the Code of Civil Procedure exclusive? 2. Assuming that the petition presents a case for equitable relief, must the plaintiff's remedy be sought in the district court of Fillmore county, where the decree was rendered, or can she maintain an independent action for that purpose in the district court of Douglas county, or other court possessing general equity jurisdiction?

Referring to the inquiry first suggested, we do not hesitate to hold that the petition presents a cause for equitable interference. It is therein alleged that the defendant deserted his family in the year 1872; that the allegations in the divorce proceeding, charging the plaintiff herein with desertion, were false and made for the purpose of corruptly deceiving the court, and supported at the trial by false and perjured testimony; that she was not personally served with notice of said action, and did not at the time know it was pending, and that she first learned of the whereabouts of the defendant and of said divorce proceeding about the time this action was commenced in 1889, nearly eleven years subsequent to the date of the decree.

[539] By section 602 of the code it is provided that the district court shall have power to vacate or modify its own judgments and decrees after the term at which they are rendered for fraud practiced by the successful party. But by section 609 it is provided that proceedings to vacate or modify a judgment or decree on the ground of fraud must be com-

menced within two years after the rendition thereof, unless the party entitled thereto be an infant, a married woman, a person of unsound mind, etc. This section appears in its present form in the Revised Statutes of 1866, hence the exception in favor of married women can have no force at this time, in view of subsequent statutes removing the disabilities imposed upon them by the common law. It is provided by section 82 that a party against whom a judgment has been rendered without other service than in a newspaper may have the same opened at any time within five years thereafter, etc. That provision, it was held in *O'Connell* v. *O'Connell*, 10 Neb. 390, is not applicable to divorce proceedings, but the force of that case as an authority, it is argued, has been weakened by subsequent decisions. However, that is a collateral question, and foreign to the present inquiry. It will be seen from what has been said that the plaintiff is without relief if the remedy provided by the code is held to be exclusive. It is a fundamental rule of equity that where courts of chancery have once assumed jurisdiction over a particular class of cases it will not be ousted therefrom simply because, in the development of legal means, redress becomes attainable at law: Story's Equity Pleading, sec. 64 *i*, and note; Bispham's Equity, 57. And that principle is distinctly recognized in section 901 of the code, viz: "Rights of civil action given or secured by existing laws shall be prosecuted in the manner provided by this code, except as provided in the following section. If a case ever arise in which an action for the enforcement or protection of a right or the redress or prevention of a wrong cannot be had under this code, the practice heretofore [540] in use may be adopted so far as may be necessary to prevent a failure of justice."

The provisions of the code being inadequate, it follows that the remedy afforded by courts of equity is still available to the plaintiff. The subject under discussion might have been dismissed by a reference to the case of *Wisdom* v. *Wisdom*, 24 Neb. 551, 8 Am. St. Rep. 215, but for the reason that it is not apparent from the statement thereof whether or not the legal remedies provided by the code were available to the plaintiff at the time the action was commenced.

2. Is the action cognizable by the district court of Douglas county? It is apparent that the cause of action is primarily to vacate the prior decree, and that the petition for divorce is but an incident thereto, upon the evident theory that the

court, having once acquired jurisdiction, will retain it for the purpose of such equitable relief as the plaintiff is entitled to: Adams' Equity, 7th Am. ed., 418. This case differs essentially, upon principle, from one in which the beneficiary of a fraudulent judgment or decree has undertaken to assert a right thereunder. In such case, whether it be by means of an execution or an action, fraud which inheres directly in the judgment or decree may be interposed as a defense. Here, however, the decree is assailed by the defendant therein in the first instance in a collateral proceeding.

According to the practice which formerly prevailed in the courts of chancery, a decree, when once enrolled, could be set aside or impeached at the instance of the parties thereto only upon a bill of review or a bill to impeach on the ground of fraud. Before the enrollment thereof the remedy was by supplemental bill in the nature of a bill of review: Adams' Equity, *416; 2 Maddock's Chancery Practice, *537. But according to the modified form of the chancery practice as it prevails in the equity courts of this country, the term "bills of review" is used in a more comprehensive sense, and includes supplemental bills of the same nature, and [521] bills to impeach on the ground of fraud: Story's Equity Pleading, secs. 403, 428; Black on Judgments, sec. 301. Considerable contrariety of opinion is apparent from the earlier cases, as well as text-books, upon the question whether bills of review and bills to impeach upon the ground of fraud are or are not original bills. A citation of the cases, or even the views of text-writers in this connection, would not be profitable.

The conflict of opinion upon the subject is sufficiently illustrated by reference to two leading American authors. In Willard's Equity, page 103, such bills are treated as strictly original bills, while in Story's Equity Pleading, sections 18, 20, 21, they are classed with those bills which "are for the purpose of cross-litigation, or of controverting or suspending or reversing some decree or order of the court or carrying it into execution," and therefore not original bills. Other writers treat them as bills in the nature of original bills: Harrison's Chancery Practice, 166. The writer has, during an examination of all of the authorities attainable, found no reported case in which the power of a different court, although possessing the same general jurisdiction with respect to the subject matter, has been invoked to impeach a decree on the ground of fraud in accordance with the practice in the courts

of chancery. In short, the terms "original bill" and "bill in the nature of an original bill" are used by the judges and text-writers in a restricted sense, and refer to the character of the pleading rather than that of the action or proceeding to which they apply. The view just expressed finds support in Willard's Equity, page 163, where it is said: "There is no case in which equity has ever undertaken to question the judgment of another court for mere irregularity. The power in such case is always exercised by the court in which the judgment was given, and the relief is frequently granted upon terms." The term "irregularity" as here used evidently includes fraud as well as such other acts or omissions as render the judgment void [543] or reversible at the election of the unsuccessful party: *Fischer* v. *Langbein*, 103 N. Y. 84; Black on Judgments, 170.

Our conclusion is that the district court of Douglas county did not have jurisdiction of the cause of action. The decree, therefore, should be reversed and the action dismissed.

The other judges concurred.

JUDGMENTS—FRAUD IN OBTAINING—COLLATERAL ATTACK.—A judgment of a domestic court having jurisdiction of the subject matter and the parties cannot be questioned collaterally for fraud *aliunde* the record by parties or privies: *Morrill* v. *Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and extended note at page 106; *Homer* v. *Fish*, 1 Pick. 435; 11 Am. Dec. 218, and note; *Oyle* v. *Baker*, 137 Pa. St. 378; 21 Am. St. Rep. 886, and note. A motion to set aside a judgment is a direct and not a collateral attack: *People* v. *Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note; *Reinhart* v. *Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52.

JUDGMENTS FOR DIVORCE OBTAINED BY FRAUD—VACATING.—A decree of divorce obtained by fraud may be set aside on motion after term by the court having jurisdiction as in case of other judgments: *Wisdom* v. *Wisdom*, 24 Neb. 551; 8 Am. St. Rep. 215, and note; *Adams* v. *Adams*, 51 N. H. 388; 12 Am. Rep. 134; *Edson* v. *Edson*, 108 Mass. 590; 11 Am. Rep. 393; *Rush* v. *Rush*, 46 Iowa, 648; 26 Am. Rep. 179; *Allen* v. *Maclellan*, 12 Pa. St. 328; 51 Am. Dec. 606, and note; *Harding* v. *Alden*, 9 Greenl. 140; 23 Am. Dec. 549. See, also, the extended note to *Greene* v. *Greene*, 61 Am. Dec. 463.

EQUITY—RETAINING JURISDICTION.—Equity having acquired jurisdiction for an equitable purpose will dispose of the whole controversy even though in so doing it may be called on to administer relief which pertains to courts of common law: *Miller* v. *Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722; *Allen* v. *Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Lynch* v. *Metropolitan etc. Ry. Co.*, 129 N. Y. 274; 26 Am. St. Rep. 523, and note, with the cases collected.

EATON *v.* FAIRBURY WATER WORKS COMPANY.

[37 NEBRASKA, 548.]

CONTRACTS BETWEEN MUNICIPALITY AND WATER COMPANY—RIGHT OF PRIVATE OWNER TO RECOVER FOR BREACH OF.—A contract and franchise granted by a city to a water company requiring that the "grantee shall constantly, day and night, except in case of unavoidable accident, keep all fire-hydrants supplied with water for instant service, and shall keep them in good order and efficiency," does not give to a private owner within the city limits, whose property is destroyed by fire, any right of action against such water company on account of its breach of contract in failing to furnish water as agreed. In such case there is no privity of contract between the water company and the private owner.

Hambel and Heasty, for the appellant.

Henry D. Estabrook and W. P. Freeman, for the respondent.

549 RYAN, C. On the fifth day of May, 1890, Martin L. Eaton filed in the district court of Jefferson county his petition, praying judgment against the Fairbury Water Works Company for the value of certain of his goods destroyed by fire on December 2, 1889. The right to the recovery sought was predicated upon the statements that the defendant was, at the time of said fire, owner of, and operating in the city of Fairbury, in said county, a system of water-works built and constructed pursuant to the terms and conditions of a certain contract and franchise entered into and granted by said city to A. L. Strang, and his successors, under the provisions of a certain ordinance of said city, whereby said Strang and his assignees were bound, during the continuance of said franchise, to keep all fire-hydrants supplied with water for instant service, and to keep them in good order and efficiency; that payment for the aforesaid service was provided to be made by the levy of a tax upon all taxable property in said city; that plaintiff was one of the said taxpayers, and that the loss aforesaid was caused by the negligent failure of the water-works company aforesaid to provide water for the hydrants near the place of said fire in sufficient quantity to extinguish the same, notwithstanding 550 it was required by said ordinance to make such provision. There was a detailed description of the property destroyed and a statement of its value, and a prayer accordingly.

On April 7, 1890, there was filed a general demurrer to said petition, which, on the eleventh day of the same month, was overruled, and two days thereafter a judgment was ren-

dered against the water-works company for the full amount claimed in the petition aforesaid. On the fifth day of the month following, the water-works company filed in said court its petition praying that the aforesaid judgment be set aside and that said water-works company be admitted to defend against the claim set up in said petition. The grounds upon which this relief was sought were that the attorneys for the water-works company had been misled as to the time when the demurrer aforesaid could be taken up and presented for determination, and therefore had failed to appear on or before the eleventh day of April aforesaid to present the defense of said company. It was claimed that this misunderstanding, in the main, was attributable to a telegram received from the attorneys for Martin L. Eaton by the attorneys for the water-works company, a contention sustained by the district court, and which, as a question of fact decided upon conflicting evidence, will be treated as correct, and therefore will receive no further notice. To the petition to open the judgment there was filed a general demurrer, after which was filed an answer putting in issue the several matters alleged in said petition, to which answer there was a reply. Upon a trial of these issues the district court made the following finding and order, to wit:

"This cause coming on to be heard upon the petition of the plaintiff and the evidence, on consideration whereof the court finds, that, without fault or negligence on the part of the plaintiff herein, it was prevented from appearing and making its defense in cause No. 47, docket F, of this court, [sic] wherein the plaintiff herein was defendant, by the acts of said Eaton and his attorneys as in plaintiff's petition alleged, and that said judgment should be vacated and set aside, but at the costs of the plaintiff herein; the court is not attempting to settle the merits of the case of said Eaton against the water-works company, and makes no finding as to the merits of said defense of said water-works company in said action. It is therefore considered that the judgment heretofore rendered in cause No. 47, docket F, wherein Martin L. Eaton is plaintiff and the said water-works company is defendant, be, and hereby is, set aside and vacated, and a new trial granted in said cause at the costs of the plaintiff herein of the former trial. It is ordered that said cause be placed upon the trial docket for trial in its order. To which acts and doings of this court all and singular the said Eaton duly excepts."

From this order awarding a new trial and vacating a former judgment in his favor the plaintiff in error brings the cause in which said order was made for review to this court. As some of the matters considered by the district judge were such that they must have transpired under his observation—such as, for instance, whether the order overruling the demurrer was entered upon being regularly reached upon call of the trial docket—we shall not attempt to review his findings that, without fault upon the part of the water-works company, or its attorneys, it was prevented from making a defense. The sole question remaining for our consideration then is, whether or not the petition of Eaton against the water-works company stated a cause of action.

Plaintiff in error predicates his right to maintain an action against the water-works company upon the following provision of the ordinance under which the water-works company, as assignee of the rights of A. L. Strang, operated its water-works. "The grantee (A. L. Strang or his assignee) shall constantly, day and night (except in the case of an unavoidable [551] accident), keep all the hydrants supplied with water for instant service, and shall keep them in good order and efficiency." It is insisted in argument that this provision, while made with the city, was for the benefit of the taxpayers, and that therefore it was a contract for the benefit of plaintiff, upon which he might bring suit for its violation to the detriment of plaintiff. The decision of this court relied upon to sustain this position is that of *Shamp* v. *Meyer*, 20 Neb. 223. As that case illustrates well the class of cases to which is applicable the principle that where a promise is made by one for the benefit of another, suit may be brought for the enforcement of such promise by the beneficiary, it should receive more than a mere passing notice. In that case Meyer was a member of the firm of Noring and Meyer, which had assumed the performance of the promise of its predecessor, one of which was to pay all the indebtedness of its predecessor, a firm of which Shamp was a member. This was not done, but Shamp was compelled to pay said indebtedness provided against, and thereupon sued Meyer for the amounts which he had thus been compelled to pay. This undertaking of the firm, of which Meyer was a member, was founded upon a valuable consideration, and it was held that though the consideration did not move directly from Shamp to the firm of which Meyer was a member, yet it did move from the parties

with whom Meyer's firm contracted, and was enforceable at the suit of Shamp, on the same principle as where in a deed, the payment of a mortgage is assumed absolutely, suit may be brought by the mortgagee against the party who thus assumed payment. In the case at bar, however, Eaton was not in any way recognized as either a party or a beneficiary, so that the authority cited in no way aids his contention. If his action could at all be maintained, it must be upon grounds different from those considered in *Shamp* v. *Meyer*, 20 Neb. 223, for, as we have observed, there is no express provision in the ordinance in his favor. The case most [553] nearly in point cited by plaintiff favorable to his right of recovery is that of *Paducah Lumber Co.* v. *Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 538, in which there were general provisions as to the manner in which payment should be made the supply company; i. e., by a general tax. As a demurrer was sustained to the petition, its averments of fact controlled the decision of the court, as clearly appears from the language of that opinion. After reciting the above manner of raising water rental by general tax, and the agreement of the water supply company in consideration thereof to supply fire protection, which, it was alleged, it had failed to do to plaintiff's loss, the opinion proceeds in this language:

"It is further stated that under a contract directly between them there had been erected, previous to the fire on the same lot where the burned property was situated, two hydrants, one within thirty and the other seventy feet of the place where the fire originated, and connected by pipes with the water-main, to be used by appellant to extinguish fires, and for steam purposes, for which it had been paying rent to appellee, and that in consideration thereof appellee had agreed to furnish and have ready at all times water sufficient to throw streams through hose kept by appellant in proper condition, to be connected with the two hydrants, the height provided for in said contract between appellee and the city of Paducah; that the fire originated in a wooden building situated on the lot of appellant, and connected with its other property, though occupied at the time by another, but said fire occurred without any fault or negligence of appellant or its servants, and it could and would have been extinguished before doing damage to the property of appellant if there had been the stipulated quantity of water in the stand-pipe and conducting-pipes, or the pumping machinery had been in readiness to

operate, and the engineer and servants of appellee had been present to set it in motion; for immediately after [553] the fire commenced and before it had done any damage, or extended to the premises then occupied by appellant, hose-pipes in good order were attached to the two private hydrants and carried to within five or six feet of the fire for the purpose of applying water to it."

Following this language there was a condensed statement of the several matters constituting the alleged negligence of the supply company in making proper provisions to extinguish the fire, by reason of all which failures recited in the petition the fire was not put out, but was suffered to inflict great loss upon appellant by the destruction of its property. Commenting upon the averments of the petition, the court proceeded thus: "Clearly appellant had a right to sue for a breach of the distinct contract set out in the petition, by which, in consideration of rent paid for the use of the two hydrants on its own lot, water was agreed to be furnished directly to it by appellee."

It will thus be seen that this private contract largely influenced the court in its determination that the demurrer had been improperly sustained to the petition. As to the right to maintain an action as upon the promise of the supply company to the city of Paducah for the benefit of the lumber company, the opinion of the court runs as follows, after an epitomized statement of the undertakings of the water supply company, to wit: "That appellee also agreed to have in the stand-pipe at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and fire protection purposes for all the inhabitants and property of the city, and to increase the number and length of hydrants and pipes when necessary to meet demands of the city and citizens; that said contract was made with appellee by the city of Paducah for the use and benefit of all its property owners and inhabitants, and appellant's property was from 1885 until destroyed by fire, in common with that of others, taxed at its full value to raise money with which to pay said hydrant rents."

[554] In this case it thus appears not only that there was a liability upon a private contract between the two companies to furnish an ample supply of water to extinguish fires, but that in addition the petition alleged that the city, for the benefit of all its property owners and inhabitants, contracted

for like immunity from fire. This last liability was alleged as arising upon an express contract for the benefit of property owners and inhabitants, who in such case undoubtedly had a right to sue upon such contract. This case having been considered upon a demurrer to the petition, its averments were conceded to be true, and it was not unreasonable (there having been therein alleged: 1. An express contract between plaintiff and defendant; and 2. An express contract between the defendant and the city of Paducah on behalf of the plaintiff) that the supply company should be held to make good its agreement for the protection of the plaintiff from fire in accordance with the terms of both contracts. This case, however, furnishes no support to the contention in the case at bar that the provision in the ordinance that Strang or his assignee "shall constantly, day and night, keep all fire-hydrants supplied with water for instant service and shall keep the same in good order and efficiency," was a contract for the benefit of plaintiff in this case. It is true that *Atkinson* v. *Newcastle etc. Water Works Co.*, L. R. 6 Ex. *404, somewhat countenances the contention of plaintiff. That case was decided mainly upon the authority of *Couch* v. *Steel*, 3 El. & B. 402. Upon appeal, however, the case of *Atkinson* v. *Newcastle etc. Water Works Co.*, L. R. 6 Ex. 404, was reversed, and the correctness of the law, as laid down in *Couch* v. *Steel*, 3 El. & B. 402, was seriously questioned: See *Atkinson* v. *Newcastle etc. Water Works Co.*, L. R. 6 Ex. 404; 46 L. J. Q. B., N. S., 775. Another case relied upon by plaintiff is that of *Rowning* v. *Goodchild*, 2 W. Black, 906, which was a suit brought against a deputy postmaster for unlawfully failing to deliver sss to plaintiff his letters. This was an action *ex delicto*, not *ex contractu*, and it would seem clear that the conceded right of one injured to sue him who caused the injury should not serve as a precedent to sustain the suit of a plaintiff who sues, not because the defendant committed the injury complained of, but because he did not prevent it. To fix liability in the latter case a contract to avert the injury must be shown—in the other case no element of contract is necessary; the law implies a contract to make reparation for his tortious act. The same considerations apply to another case cited by plaintiff (*Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686), where the action was for the failure of the dock company to keep its docks in proper condition, whereby the ship and cargo of Gibbs were damaged. It is quite a matter of doubt why the

case of *Western Saving Fund Society* v. *City of Philadelphia*, 31 Pa. St. 185, was cited, for the question in that case was simply whether there could be increased the number of trustees from twelve, as provided in the ordinance, to eighteen as proposed, a loan having been made upon the faith of the ordinance as it stood.

The case of *Lacour* v. *Mayor etc.*, 3 Duer, 406, involved merely the right of plaintiff to recover for damages caused him in the necessary suspension of his business resulting from the manner in which an excavation was made in the streets. The entire opinion in the case of *Bailey* v. *Mayor etc.*, 7 Hill, 146, is embraced in the following language: "As the verdict in the present case was rendered before the act of 1844 was passed, the charge for interest should have been disallowed. Notwithstanding the peculiar phraseology of the section relied on by the plaintiff's counsel, we think it ought not to be so construed as to give it a retroactive effect." As to the inapplicability of this language to the case at bar, no comment is necessary. The above are all the cases cited to sustain the contention of plaintiff. By the defendant are also cited a number of adjudicated cases, of which will we notice the following in detail:

Davis v. *Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, was an action to recover the value of certain buildings destroyed by fire, upon the ground that defendant was bound by contract with the city of Clinton to supply water to be used in extinguishing fires, and failed to perform its obligation in this respect, whereby resulted the destruction of plaintiff's property. Delivering the opinion of the court, Beck, J., said: "The only question presented in the case is this one: Is the defendant liable to plaintiff upon the contract embodied in the ordinance? The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and defendant. It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all

interests and are entitled to all rights secured by the contract. If mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist which must not be regarded as abrogating the rule itself. Thus, if one under a contract received goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor; so the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or property [557] to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist: See *Second National Bank of St. Louis* v. *Grand Lodge*, 98 U. S. 123. The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority, it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace, and order enforced by police regulations, and the like. It cannot be claimed that the agents or officers of the city, employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and are responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city."

The case of *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1, was upon a like claim for damages with that above considered, and Park, C. J., delivering the opinion of the court, said: "It will be observed that the plaintiffs complain that the defendants did not supply with water the

hydrants which had been established by the city and the Bridgeport Water Company under their contract, to enable the city through its fire department to perform a public duty which it owed to the plaintiff and others, to extinguish their fires. Had the plaintiffs' fire been extinguished [558] it would have been done by the fire department; for there is no allegation in the count that the plaintiffs had hose which might have been attached to the hydrants, and the fire extinguished by their own efforts. Hence, whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In *Foster* v. *Lookout Water Co.*, 3 Lea, 45, the conclusion above announced was arrived at by the court, which, in its opinion, quoted with approval a considerable part of the language of Park, C. J., of which we have made use.

In *Becker* v. *Keokuk Water Works Co.*, 79 Iowa, 419, 18 Am. St. Rep. 377, and in *Van Horn* v. *City of Des Moines*, 60 Iowa, 447, 50 Am. Rep. 750, the same doctrine was again recognized and enforced; but as full quotations have already been made from the supreme court of Iowa, it would be like mere repetition to quote at length opinions on the same subject from the same source. The decided weight of authority, as well as the better reason, is in favor of the rule above announced. In the case under consideration the contract embodied in the ordinance (of which the provisions were accepted by A. L. Strang) made no mention of, or reference to, plaintiff, or any class of citizens or taxpayers of which he was one. The payment of taxes by him for the water-works company entitled him to no more privileges in reference to the subject matter for which the taxes were collected than if it had been for any other purpose for which taxes might be [559] levied. Let us suppose that this tax had been paid for disbursement to a contractor who built sidewalks or laid down pavements for the city. Could it reasonably be claimed that this fact gave the taxpayer any special ground of recovery

against the contractor for injuries received by reason of a failure to complete the works of improvement as agreed? Manifestly, in the case supposed there is no privity between the contractor and the taxpayer, no matter how solemnly the contractor had agreed to perform the work in a specified time or manner. In such a case there might be a right of recovery against the city. In the one under consideration there could not, even if it assumed directly to furnish water to the consumer. "The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of those acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought, or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk": *Foster* v. *Lookout Water Co.*, 3 Lea, 49. The liability of the water-works company in this case could not, therefore, devolve upon it by reason of its assumption of certain functions which might properly be assumed by the municipal corporation, for the municipality itself would not be liable under the circumstances, and its right of exemption extends to its substitute.

The plaintiff has not established any privity of contract between himself and the defendant, and we conclude that no action would lie in favor of plaintiff upon the facts see stated in his petition. The judgment of the district court is therefore affirmed.

RAGAN, C., concurs.

IRVINE, C., having been of counsel in the above cause, took no part in its consideration or decision.

WATER COMPANIES—PRIVITY OF CONTRACT.—No privity of contract exists between taxpayers and a water company contracting with a city for the supply of water to extinguish fires, and no action lies by a taxpayer for injuries caused by a failure to supply the water: *Mott* v. *Cherryvale Water etc. Co.*, 48 Kan. 12; 30 Am. St. Rep. 267, and note. *Contra*, *Paducah Lumber Co.* v. *Paducah Water etc. Co.*, 89 Ky. 340; 25 Am. St. Rep. 536, and note; *Britton* v. *Green Bay etc. Water Works Co.*, 81 Wis. 48; 29 Am. St. Rep. 856, and note.

SCROGGIN *v.* MCCLELLAND.

[37 NEBRASKA, 644.]

NEGOTIABLE INSTRUMENTS—CHECKS—PRESENTMENT.—Checks are not designed for circulation, but for immediate presentment for payment, and if not thus presented within a reasonable time according to the circumstances, the maker or indorser is released from liability.

BANK CHECKS.—STATUTE OF LIMITATIONS BEGINS TO RUN in favor of the drawer of an ordinary bank check, at the latest upon the expiration of a reasonable time for presenting the check for payment, whether the drawer is injured by the delay in presentment or not.

JUDICIAL NOTICE—LAWS OF ANOTHER STATE.—The courts of one state do not take judicial notice of the laws of another. In the absence of proof the laws of both states are presumed to be the same.

J. M. Ragan and S. A. Searle, for the appellant.

H. W. Short, for the respondent.

645 IRVINE, C. The defendant in error sued the plaintiff in error in the district court of Nuckolls county upon a check drawn by plaintiff in error to the order of defendant in error for seven hundred and forty-six dollars and twenty-two cents upon Scroggin and Son, bankers, Mount Pulaski, Illinois, and dated November 10, 1882. He alleged presentment and dishonor of the check November 14, 1888. The suit was begun February 20, 1889. The plaintiff in error, in answer, pleaded: 1. The statute of limitations; 2. That the check was presented and paid at or about the day of its date; 3. Matter claimed to operate in estoppel, which it will not be necessary here to notice. The reply amounts to a general denial. The case was tried to the court, a jury being waived, and there was a general finding, and judgment for the defendant in error.

One of the errors assigned, and the only one which we shall notice, is, that the court erred in not finding that the action was barred by the statute of limitations. This assignment raises the question as to when the statute begins to run upon a bank check in an action against the drawer of the check. A check is in some respects analogous to a bill of exchange or a note payable on demand. On notes payable on demand the statute of limitations has been held to run from the date of the note: *Little* v. *Blunt*, 9 Pick. 488; *Wenman* v. *Mohawk Ins. Co.*, 13 Wend. 267; 28 Am. Dec. 464. Where a drawer of a check had no funds to meet it, it was held that the statute began to run from the date of the check: *Brush* v. *Barrett*, 82 N. Y. 400; 37 Am. Rep. 569.

It is true that the last case was decided upon the theory that inasmuch as the drawer had no funds in the bank to meet the check, presentment immediately would have been unavailing, and a cause of action, therefore, arose in favor [646] of the payee as soon as the check was given. We can see, too, that there is a distinction between a note payable on demand and a check, as an action lies at once against the maker of a demand note without actual prior demand: *Norton* v. *Ellam*, 2 Mees. & W. 461; *Burnham* v. *Allen*, 1 Gray, 496; *New Hope Delaware Bridge Co.* v. *Perry*, 11 Ill. 467; 52 Am. Dec. 443. Nevertheless, a check is not designed for circulation, but for immediate presentment: *First Nat. Bank* v. *Miller*, 37 Neb. 500; *ante*, p. 499.

The time within which presentment must be made is quite limited. Ordinarily, when the payee of a check and the bank upon which it is drawn are in the same town, a check must be presented before the close of banking hours the day after it is received: See cases cited in note to *Holmes* v. *Briggs*, 131 Pa. St. 233; 17 Am. St. Rep. 804. Otherwise, it should be forwarded for presentment the day after it is received by the payee, and presented the day after it is received by the agent for collection. Special circumstances may excuse a greater delay, but no excuse is pleaded or proved for the delay in this case. We think that the statute should be deemed to have begun to run, at the latest, upon the expiration of a reasonable time for presenting the check, and that a delay for over six years would complete the bar of the statute beyond all question.

It is claimed by defendant in error that delay in presenting the check does not release the drawer, unless he has been injured. This is the rule where suit is brought within the period of limitations, but the statute in all cases bars relief. The statute runs in favor of the drawer as well as others. It is also claimed that the drawer has, during the whole period, resided in Illinois, and that the statutory period is there ten years. This may be true, but it is neither pleaded nor proved. The court cannot take judicial notice of the law of another state, but, in the absence of proof, it will be presumed to be like that of our own: *Lord* v. *State*, 17 Neb. 526; *Bailey* v. *State*, 86 Neb. [647] 808. Presuming the law of Illinois to be the same as our own, the action had been barred by the laws of that state at the time it was commenced here, and was therefore barred here: Code Civ. Proc.,

sec. 18; *Hower* v. *Aultman*, 27 Neb. 251. Aside from the failure of proof upon this point, the pleadings entirely failed to present the issue. Upon the face of the petition the action was barred, and a demurrer would have lain.

Reversed and remanded.

RYAN, C., concurs.

RAGAN, C., having been of counsel in the case, took no part in its consideration or decision.

CHECKS—PRESENTMENT—DILIGENCE REQUIRED.—To charge an indorser of a check, it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time depends upon the circumstances of the case: *First Nat. Bank* v. *Miller*, 37 Neb. 500; *ante*, p. 492, and note.

EVIDENCE—JUDICIAL NOTICE OF LAWS OF ANOTHER STATE.—Judicial notice will not be taken by the courts of one state of the laws of another, but they must be pleaded and proved like other facts: *Osborn* v. *Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400, and note; *Cincinnati etc. R. R. Co.* v. *McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *Siegel* v. *Robinson*, 56 Pa. St. 19; 93 Am. Dec. 775; *Brimhall* v. *Van Campen*, 8 Minn. 13; 82 Am. Dec. 118, and note; *Holmes* v. *Broughton*, 10 Wend. 75; 25 Am. Dec. 536, and note; *Harvey* v. *Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159, and note.

AMERICAN CENTRAL INSURANCE CO. *v.* HETTLER.

[37 NEBRASKA, 849.]

GARNISHMENT IS AN ATTACHMENT by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim.

GARNISHMENT—JURISDICTION.—To subject money or property to garnishment it must be within the jurisdiction of the court.

GARNISHMENT IN ANOTHER STATE—JURISDICTION.—An insurance company indebted for a loss payable in one state cannot be garnished in another, where it has no money or property of the debtor within the jurisdiction of the court.

GARNISHMENT IN ANOTHER STATE—JURISDICTION.—Garnishment proceedings must be instituted in the state where the debt is payable, or the property is to be delivered, and a garnishment in one state of a debt due and payable in another is void.

Abbott and Abbott, for the appellant.

F. I. Foss, for the respondent.

850 MAXWELL, C. J. This action was brought in the district court of Saline county by the defendant against the plaintiff to recover five hundred dollars for loss upon a policy of insurance issued by the plaintiff. To this the plaintiff in

error answered, setting up that it had been garnished in the state of Illinois and the answer of the garnishees sustained. The service in that case on Hettler was by publication. A copy of the opinion of Gary, P. J., is set out in the record. The cause was submitted to the court below on the following [851] stipulation:

"It is hereby stipulated and agreed by and between the parties plaintiff and defendant to this action that the plaintiff was insured by the defendant company, and that the loss occurred as stated in plaintiff's petition, and that the same was adjusted at the sum of five hundred dollars, and no part of the same has been paid; that the plaintiff is a resident of Saline county, Nebraska, is the head of a family, residing with and supporting the same, at Crete, Saline county, Nebraska, and has been for the last past five years, and has neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state; and that the plaintiff in his action has no personal property which would be subject to execution, or which would be exempt to him, except a few articles which would come under section 530 of the Code of Civil Procedure, such as household furniture, which are of but little value, and that the five hundred dollars which the plaintiff seeks to have as exempt to him in this action is all the personal property he has. The filing of an inventory as required by law is hereby waived, it being admitted that the five hundred dollars is exempt in addition to whatever property the plaintiff may have under the laws of the state of Nebraska; that the defendant company has its headquarters and principal office at St. Louis, Missouri, but has a permanent agency at Crete, Saline county, Nebraska, does business there, and is so authorized by the laws of this state, and that said insurance was effected at that agency; that the agent at Crete is and was Jindra & Co., Joseph Jindra being the senior and principal member of that firm. It is also agreed that said defendant company has a general and permanent agency at the city of Chicago, in the state of Illinois, does an insurance business there, and has complied with all the laws of that state in that behalf, and that C. M. Rogers is its duly authorized agent at Chicago, and was such on and prior to the twenty-ninth day of May, 1891; that on that date August Beck & Co., a firm residing and doing business at Chicago, aforesaid, commenced an [852] action by attachment against

this plaintiff on an account held by them against this plaintiff for goods ordered by plaintiff from them at Chicago and by them sent to plaintiff by railroad from that place, claiming the sum of two hundred and eighty-nine dollars and twenty-one cents; that the attachment writ ran against plaintiff as principal and this defendant as garnishee, and was duly served on said agent, Rogers, on said date; that defendant at once notified said Hettler of that fact by mail, and that all subsequent proceedings were had thereon as shown by the transcript of proceedings filed herewith; that the law and practice in Illinois is, that on filing of answer by a garnishee the plaintiff in garnishment may accept the answer as true, and have judgment accordingly, or may accept to (deny) the answer, and thus raise an issue of fact, which is then tried as other issues of fact, and final judgment entered thereon, upon which execution issues as in other cases at law; that due publication was made and default entered against Hettler on the tenth day of July, 1891; that the defendant company answered on the fifth day of August, stating that it owed Hettler five hundred dollars, and claimed for him four hundred dollars exemption, that being the amount allowed by the laws of that state; that Beck & Co. have not elected to take judgment on said answer, nor yet filed any exceptions thereto, but still have time to file the same; that the transcript hereto annexed and above referred to shows all the proceedings had in said matter up to this date, and that said proceedings are still pending and undetermined in said superior court, and that court is a court of general and superior jurisdiction, and has full cognizance of said action and proceedings, and that defendant's answer in the district court of Saline county, Nebraska, may be so amended as to state that fact. It is also agreed that the 'Revised Statutes of Illinois,' edition of 1891, by Hurd, shall be authority for either party in this case, and may be read from as evidence by either party upon all questions arising in this case, whether the statute be pleaded or not, and as fully as if pleaded; said statute to be marked as Defendant's Exhibit 'A,' and then be the property of both parties for the purpose of this trial. All of which is mutually agreed to by

F. I. Foss,
"Attorney for Plaintiff.
"ABBOTT AND ABBOTT,
"Attorneys for Defendant."

On the trial of the cause in court below, judgment was rendered in favor of Hettler. The question presented to this court is the jurisdiction of the Illinois court to render judgment against the company. Garnishment is an attachment by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim. To subject the property to attachment it must be within the jurisdiction of the court; otherwise, it would be powerless to condemn it, order a sale, and apply the proceeds to the payment of the judgment in favor of the creditor. This question was fully considered in *Mathews* v. *Smith*, 13 Neb. 178, and *Wright* v. *Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747. In the latter case it was held that a foreign corporation, having no property of the debtor in this state, nor owing money payable to him therein, was not subject to garnishment in this state. The same doctrine was approved in *Turner* v. *Sioux City etc. R. R. Co.*, 19 Neb. 241. It nowhere appears in the record that the insurance company had any money or effects of the defendant in error in Chicago. It is true it was indebted to him in the sum of five hundred dollars for losses sustained by fire, but the losses had occurred in this state and the money was payable here. An officer with a writ of attachment and notice of garnishment in Saline county could receive the money. This an officer in Chicago could not do. Gary, P. J., says "that the construction of the law given by that court might subject the plaintiff to the payment of the debt twice." With due respect 854 to that honored judge, it seems to the writer that such a construction is abhorrent to our sense of justice. By what right do the courts—the conservators of rights—sanction the double payment of a debt and indifferently fold their arms and say in effect that "it is none of our business." It is the business of the courts to administer justice as far as possible and protect and enforce the rights of every one. The amount involved in this case is but a few hundred dollars, but the principle, if once established, will apply to all claims, even if they amount to tens of thousands or millions of dollars; and if a company may be robbed of a few hundred dollars, why may it not be of thousands, if the occasion arise, and the company thereby be rendered bankrupt. It is true the insurance company has many agencies for the transaction of its business. These are necessary to enable it to procure

risks. It is true also that it is indebted to the defendant in error; and as the loss has been adjusted it is ready to pay the same where the contract requires it to be paid—at Crete. The case, in some respects, resembles that of a note payable at a particular place, as the State Bank of Crete. In order to charge an indorser, demand of payment must be made at the place designated. If no place is named, then it should be made where the note was given and the maker has his home or place of business: Daniel on Negotiable Instruments, sec. 635. Suppose the company had given a note payable at the State Bank of Crete, Nebraska. Would demand at a bank in Chicago, or at any point except that designated, have been sufficient? So here there is an agreement to pay at the residence of the insured; and garnishment proceedings will not lie at any other point. The case of *Hamilton* v. *Rogers*, 67 Mich. 135, is similar in some respects to the one at bar, and it was held that the garnishment in Michigan of a debt payable in New Mexico was a nullity. In a case of this kind the remedy is simply to require the proceedings to be instituted [855] where the debt is payable or the property delivered, and it can be instituted nowhere else. The Illinois court, therefore, had no jurisdiction, and the judgment is affirmed.

The other judges concur.

GARNISHMENT—JURISDICTION—SITUS OF PROPERTY.—Property outside the state where the action is brought may not be garnished: *Bates* v. *Chicago etc. Ry. Co.*, 60 Wis. 296; 50 Am. Rep. 369; *Bowen* v. *Pope*, 125 Ill. 28; 8 Am. St. Rep. 330, and note. A nonresident is not subject to garnishment unless, when garnished, he has in the state where the action is pending and the attachment is obtained property of the defendant under his control, or is bound to pay the defendant money, or to deliver to him goods at some particular place within the state: *Neufelder* v. *German etc. Ins. Co.*, 6 Wash. 336; 36 Am. St. Rep. 166, and note. In attachment proceedings, the *res* must be within the jurisdiction of the court issuing the process in order to confer jurisdiction: *Douglass* v. *Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448.

GARNISHMENT—WHAT IS.—Garnishment is attachment in the hands of a third person, and is thereby a species of seizure by notice: *Beamer* v. *Winter*, 41 Kan. 596. Garnishment while in the nature of a proceeding *in rem* is in effect an action by the defendant in the plaintiff's name against the garnishee, the purpose and result of which are to subrogate the plaintiff to the rights of the defendant against the garnishee: *Neufelder* v. *German etc. Ins. Co.*, 6 Wash. 336; 36 Am. St. Rep. 166.

SALISBURY v. FIRST NATIONAL BANK OF CAMBRIDGE CITY.

[37 NEBRASKA, 872.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—LIABILITY OF INDORSER.—A third person who indorses his name upon a note in blank at the time it is executed and before delivery, is, as to a subsequent *bona fide* holder for value, liable thereon as a joint maker.

Brome, Andrews, and Sheean, for the appellants.

Congdon and Clarkson, for the respondent.

874 NORVAL, J. This action was brought in the court below by the First National Bank of Cambridge City, Indiana, against the plaintiffs in error and one Cora H. Sloman as makers, and the Bank of Omaha, as indorser, of a promissory note, of which the following is a copy:

"$2,500.00. OMAHA, NEB., Feb. 15, 1889.

"Ninety days after date, we, or either of us, promise to pay to the Bank of Omaha, or order, twenty-five hundred and $\frac{00}{100}$ dollars, for value received, payable at the Bank of Omaha, Omaha, Neb., with interest at the rate of ten per cent per annum from maturity until paid. C. H. SLOMAN."

875 At the time of the making of said note and its delivery to the payee the names of J. G. Salisbury and S. A. Sloman appeared upon the back thereof. Subsequently, but before the maturity of the note, it was indorsed and transferred by the Bank of Omaha to the defendant in error, the First National Bank of Cambridge City. No notice of nonpayment was given to J. G. Salisbury and S. A. Sloman at maturity. The note was sent by the plaintiff below to the Bank of Omaha for collection prior to its maturity, where it remained until after the same fell due. The Bank of Omaha made no defense. Cora H. Sloman set up two defenses: 1. Payment; and 2. Coverture. The former she withdrew upon the trial; Salisbury and S. A. Sloman each filed a separate answer, which "denies that he executed and delivered the promissory note described in the petition, but avers and charges the fact to be that the defendant, at the time of the delivery of said note to the Bank of Omaha, was simply accommodation indorser thereon, the name of this defendant being written across the back of said note. Nor did said defendant receive any part of the consideration for which said note was given." Each answer further alleged that the note was not protested

for nonpayment, nor was notice of nonpayment given to the defendants at the time of the maturity thereof.

Plaintiff replied by a general denial.

Upon the trial the jury, under the instructions of the court, returned a verdict in favor of the plaintiff, and against all the defendants for the full amount of the note and interest. Separate motions for a new trial were filed by plaintiffs in error and Cora A. Sloman, which were overruled, and judgment entered on the verdict.

The question to be considered by this court is this: Were plaintiffs in error liable as makers of said note, or were they chargeable as accommodation indorsers merely? If the obligation they assumed by indorsing their names [876] upon the back of the note, before its delivery to the payee, was that of maker the judgment under review was right; otherwise not, inasmuch as no notice of nonpayment at maturity was given to plaintiffs in error. The kind of liability that the law presumes is assumed by one who signs his name in blank upon the back of a negotiable promissory note at the time of its execution, and before its delivery to the payee, has never been passed upon or decided by this court, and there is a great diversity of holding upon the question by text-writers and courts in this country.

Several courts of high standing sustain the doctrine for which plaintiffs in error contend, namely, that where a stranger writes his name across the back of a note before its delivery to the payee, he is liable thereon as an indorser: *Moore* v. *Cross*, 19 N. Y. 227; 75 Am. Dec. 326; *Phelps* v. *Vischer*, 50 N. Y. 69; 10 Am. Rep. 433; *Slack* v. *Kirk*, 67 Pa. St. 380; 5 Am. Rep. 438; *Clouston* v. *Barbiere*, 4 Sneed, 336; *Jennings* v. *Thomas*, 13 Smedes & M. 617; *Jones* v. *Goodwin*, 39 Cal. 493; 2 Am. Rep. 473.

There is another line of decisions which hold that a person so indorsing a note is chargeable, *prima facie*, as a grantor: *Webster* v. *Cobb*, 17 Ill. 459; *Bratchford* v. *Milliken*, 35 Ill. 434; *Lowell* v. *Gage*, 38 Me. 36; *Sturtevant* v. *Randall*, 53 Me. 154; *Cook* v. *Southwick*, 9 Tex. 615; 60 Am. Dec. 181; *Killian* v. *Ashley*, 24 Ark. 511; 91 Am. Dec. 519.

The decided weight of authority supports the rule adopted by the trial court in this case, and that is that plaintiffs in error are liable as joint makers: Story on Promissory Notes, secs. 468, 469; *Good* v. *Martin*, 95 U. S. 90; *First Nat. Bank* v. *Lock-Stitch Fence Co.*, 24 Fed. Rep. 221; *Bendey* v. *Townsend*,

109 U. S. 665; *Chaddock* v. *Vanness*, 85 N. J. L. 517; 10 Am. Rep. 256; *Quin* v. *Sterne*, 26 Ga. 223; 71 Am. Dec. 204; *Sylvester* v. *Downer*, 20 Vt. 355; 49 Am. Dec. 786; *National Bank* v. *Dorset Marble Co.*, 61 Vt. 106; *Robinson* v. *Bartlett*, 11 Minn. 410; *Peckham* v. *Gilman*, 7 Minn. 446; *Schmidt* v. *Schmaelter*, 45 Mo. 502; [877] *Cahn* v. *Dutton*, 60 Mo. 297; *Melton* v. *Brown*, 25 Fla. 461; *Wetherwax* v. *Paine*, 2 Mich. 555; *Sibley* v. *Muskegon Nat. Bank*, 41 Mich. 196; *Moynahan* v. *Hanaford*, 42 Mich. 329; *Flint* v. *Day*, 9 Vt. 345; *Sandford* v. *Norton*, 14 Vt. 228; *Stevens* v. *Parsons*, 80 Me. 351; *Schroeder* v. *Turner*, 68 Md. 506; *Bright* v. *Carpenter*, 9 Ohio, 139; 34 Am. Dec. 432; *Derry Bank* v. *Baldwin*, 41 N. H. 434; *Perkins* v. *Barstow*, 6 R. I. 505; *Baker* v. *Robinson*, 63 N. C. 191; *Hoffman* v. *Moore*, 82 N. C. 313; *Brown* v. *Butler*, 99 Mass. 179; *Way* v. *Butterworth*, 108 Mass. 509. Many other authorities to the same effect could be cited.

In *Bright* v. *Carpenter*, 9 Ohio, 139, 34 Am. Dec. 432, Lane, C. J., observes: "If a person, not a party, give his name to a note already existing, his engagement is collateral only, and he is to be held as guarantor; but if such a person sign his name to such a paper at the time of its execution, without prescribing the limits of his responsibility, he authorizes the holder to treat him as a maker, and is as much bound as if his name was written under that of the principal."

Judge Story, in discussing the question in his valuable work on Promissory Notes, at section 469, says: "The principle upon which all these cases turn is the same; and that is, to expound the particular transaction, without reference to the form which it has assumed, in such a manner as will best carry into effect the substantial intention of the parties, *ut res magis valeat quam pereat*, rather than by a close or technical interpretation, adhering to the letter, to defeat the very objects and purposes for which alone the transaction must have taken place, and thus to make it operate at once as a delusion and a fraud upon the ignorant or the unwary. Nor is there any thing novel in this mode of interpretation applied to this class of cases. It stands upon the principle that two instruments of the same general nature, both executed at the same time and relating to the same subject matter, are to be construed together, as forming but one [878] agreement. As he who signs on the face, and he who indorses his name on the back, both promise to do the very same thing, to wit, to pay the money at the specified time, they may, without doing

violence to the contract, be deemed as joint makers; and as, in point of form, each promises for himself, the undertaking may be treated as several as well as joint. In respect to the consideration, it has been thought sufficient that the indorsement purports to be 'for value received,' or that the consideration, if not expressed, is established in proof by the contemporaneous facts when the note was made."

There is no room for doubt that where a person not a payee places his name upon the back of a note in blank, before it has passed into the hands of the payee, he may be proceeded against as maker, indorser, or guarantor, according to the circumstances of the case and the intention of the parties at the time of the transaction; but as between the original parties, at least, parol evidence is admissible to show the real character of the obligation assumed by him; that is, whether his undertaking was that of a joint maker, guarantor, or indorser. We are constrained to adopt the rule sustained by the current of authorities, and the one which is in harmony with the decisions of the supreme court of the United States, namely, that when a third person indorses his name upon a note in blank at the time it is executed, and before delivery, the law presumes, in the absence of evidence showing the nature of his undertaking, that he intended to assume the liability of an original promisor. Applying this rule to the case at bar, it will be presumed that the plaintiffs in error, by placing their names upon the back of the paper in suit, intended to incur the liability of a maker.

We do not think that the trial court erred in not permitting plaintiffs in error to show the intent with which they backed the note in controversy. The answer was not sufficient to admit of such proof. Besides, plaintiff below [879] purchased the paper in good faith, for value, before maturity; and as against such indorsee, parol evidence was inadmissible to show that the character or limit of the liability of plaintiffs in error was other or different from that which the law presumes it to be.

Cora H. Sloman filed a separate petition in error in the case in this court, but having failed to favor us either with a brief or oral argument upon her assignments of error, and no error appearing upon the record prejudicial to her rights, her petition in error is overruled. The judgment of the district court is affirmed.

The other judges concurred.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS IN BLANK.—One who indorses a note in blank, by either writing his name above or below that of the payee, is liable *prima facie* as a maker: *National Bank* v. *Dorset Marble Co.*, 61 Vt. 106; but this rule does not apply to the indorsement of a note made payable to the order of the drawer: *First Nat. Bank* v. *Payne*, 111 Mo. 291; 33 Am. St. Rep. 520. One who indorses in blank a promissory note of which he is not the payee, authorizes the payee to write over such indorsement a guaranty of the payment of the note: *Moore* v. *McKenney*, 83 Me. 80; 23 Am. St. Rep. 753, and note. A blank indorsement from indorser to indorsee creates the same liability as if it was in full: *Bean* v. *Briggs*, 1 Iowa, 488; 63 Am. Dec. 464, and note. See, also, the notes to *Perkins* v. *Catlin*, 29 Am. Dec. 297–299, and *Dietrich* v. *Mitchell*, 92 Am. Dec. 102.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

HATTERSLEY *v.* BISSETT.

[51 NEW JERSEY EQUITY, 507.]

ADVANCEMENTS—PRESUMPTION—EVIDENCE.—Advancements indicate something given in anticipation of what a beneficiary may succeed to by inheritance, succession, or gift, at the death of the donor, and are presumptively a satisfaction *pro tanto* or in the whole of ulterior benefits. This presumption is liable to be fortified or rebutted by extraneous evidence.

ADVANCEMENTS—PRESUMPTIONS.—CONVEYANCES OF LAND BY PARENT TO CHILD for a consideration named therein of natural love and affection, or for a nominal valuable consideration, are presumptively an advancement. This presumption may be overcome by extrinsic evidence.

ADVANCEMENTS—PRESUMPTION—PROOF TO REBUT.—The presumption that a conveyance of land made by a parent to his daughter for a nominal consideration and natural love and affection is made by way of advancement is overcome by proof that such conveyance was made as compensation to the daughter, for services rendered in taking care of and nursing the grantor during a number of years.

ELECTION IS AN OBLIGATION IMPOSED upon a party to choose between two inconsistent rights or claims in cases where there is a clear intention of the person from whom he derives one that he shall not enjoy both.

WILLS—SUBSEQUENT CONVEYANCE AS REVOCATION OF—ELECTION.—A conveyance by a testator to his daughter, after the execution of his will, of lands devised to his son operates as a revocation of the devise to the son, and the daughter is not compelled to elect between the conveyance to her by deed and the benefits derived by her under the will. She takes under both.

John H. Backes, for the appellants.

Woodbridge Strong and Alan H. Strong, for the respondents.

508 DEPUE, J. Charles Hattersley, the testator, died May 5, 1890, leaving a will made and executed April 16, 1884. At the time of making the will the deceased was seised in fee of

several parcels of land in East New Brunswick, designated on the map as plots Nos. 2, 3, 4, and 5, and also three lots in the city of Trenton, viz., No. 129 South Broad street and Nos. 201 and 203 Perry street.

By his will the testator devised his property to his four children, as follows: To Elizabeth H. Cherry, No. 129 Broad street, Trenton, in fee, and the westerly part of block No. 5, in East Brunswick, for life; to Jane A. Hattersley (now Mrs. Bissett), the easterly half of the said block No. 5 and the remainder in the other part after the death of Mrs. Cherry, in fee; to Thomas S. Hattersley, No. 203 Perry street, Trenton, and plots Nos. 2, 3, and 4, in East Brunswick; and to Charles M. Hattersley, No. 201 Perry street. By the residuary clause in his will, the testator devised and bequeathed the residue of his estate to his two daughters, Mrs. Cherry and Mrs. Bissett, their heirs and assigns, to be equally divided between them.

Mrs. Cherry died May 4, 1884, in the lifetime of the testator, without issue, and, therefore, in the devolution of title under the will, No. 129 Broad street, which had been devised to her in fee, fell into the residue. But, inasmuch as, by the residuary clause in the will, the equal one-half part of the residuary estate was given to Mrs. Cherry, by her death in the testator's lifetime, he died intestate with respect to the equal undivided one-half part of the Broad street property, which descended to his three surviving children as his heirs at law.

By a deed of conveyance duly executed, and acknowledged and delivered by the testator, bearing date October 17, 1888, he conveyed to Mrs. Bissett, in fee, all the East Brunswick property. This conveyance comprised, in addition to block No. 5, which Mrs. Bissett took by the will, blocks Nos. 2, 3, and 4, which, by the will, were devised to Thomas.

Mrs. Bissett claims all the East Brunswick property under the deed of conveyance, and one undivided half part of the Broad street property under the residuary clause of the will, and also the undivided one-third part of the other half of the Broad street property, as one of the heirs at law of the testator.

In this situation of the title of the parties respectively, Thomas S. Hattersley filed in the court of chancery two bills of complaint, to each of which Mrs. Bissett was made a party.

The first of these bills was filed for the partition of No. 129 Broad street, in the city of Trenton, which, by the testator's will, was devised to Mrs. Cherry in fee.

The bill, as amended, charges that the lands conveyed to Mrs. Bissett by the deed made to her by the testator of the date of the 17th of October, 1888, were an advancement, and were of greater value than the value of an equal undivided one-half part of the premises whereof the said testator died intestate, and that, by reason thereof, the said Jane A. Bissett is not, as one of the heirs at law, entitled to any share in that part of the premises which descended to his heirs at law. The deed, on its face, purports to have been made for the consideration of one dollar and natural love and affection.

The first section of the act regulating the descent of lands contains the proviso "that if any such ancestor shall, in his lifetime, have given or advanced any part of his or her lands, tenements, or hereditaments to any of his or her issue, such issue shall not be entitled to any part or share of such ancestor's real estate, descending under or by virtue of this act, unless the real estate so given or advanced shall not be equal in value to the respective shares of the other issue in the same degree of affinity, as the case may be, and then no more than will be sufficient to make such share equal in value to the respective shares of the other issue, in the same degree of consanguinity to the said deceased ancestor": Rev. Stats. 297.

The words in this proviso are "given or advanced." In the statute of distributions the word "advanced" alone is used: Rev. Stats., sec. 146, p. 784; 22 and 23 Car. II., c. 10, sec. 5. In the law of legacies a legacy is said to be adeemed by an "advancement." In cases of these aspects "advancement" is a term employed to indicate something given in anticipation of what the beneficiary may succeed to by inheritance, succession, or gift at the death of the donor, and is presumptively a satisfaction *pro tanto* or in the whole of such ulterior benefits. This presumption is liable to be fortified or rebutted by extraneous evidence: 2 Taylor on Evidence, sec. 1227; 2 Roper on Legacies, 401, 404; 2 Williams on Executors and Administrators, 1501, 1504; 2 Lead. Cas. Eq., 6th ed., 398, 401, 402; *Fowkes* v. *Pasco*, L. R. 10 Ch. 343; Brett Lead. Cas. 248, and notes, 250–252; *Lord Chichester* v. *Coventry*, L. R. 2 Eng. & I. App. 71; *Tussaud* v. *Tussaud*, 9 Ch. Div. 363, 378; *Sims* v. *Sims*, 10 N. J. Eq. 158, 163; *Peer* v. *Peer*, 11 N. J. Eq. 432; *Speer* v. *Speer*, 14 N. J. Eq. 240, 249; *Van Houten* v. *Post*, 33 N. J.

Eq. 344, 346, 347. Whether a gift by a testator or intestato in his lifetime to a legatee or distributee is an advancement, being a question of intention, must be open to discussion and consideration upon extrinsic evidence.

[601] A conveyance of lands by a parent to one of his children for a consideration named therein of natural love and affection, or for a nominal consideration, is an advancement within the meaning of the proviso in the first section of the act regulating the descent of lands, unless a contrary intention be made to appear: *Den* v. *McPeake*, 2 N. J. L. 211, 291*; *Gordon* v. *Barkelew*, 6 N. J. Eq. 94. And although the deed purports to be made for a valuable consideration, the acknowledgment of the receipt of such a consideration is only *prima facie* evidence, and may be rebutted by extrinsic evidence: *Speer* v. *Speer*, 14 N. J. Eq. 240. The question, as was said by Chancellor Green in *Speer* v. *Speer*, 14 N. J. Eq. 240. is one of intent, and the presumption that the conveyance was by way of a gift or advancement may be overcome by proof.

The evidence in this case shows that Mrs. Bissett was born in 1849; her mother died in 1865; and the deceased remained a widower until his death, in 1890, within one month of attaining the age of eighty-four years. It also appears that after Mrs. Bissett returned from school she became housekeeper for her father, with her sister doing the housework and nursing her father. Mrs. Cherry died in May, 1884, shortly after the will was made. From that time Mrs. Bissett was the sole housekeeper. The deed was made in 1888. The evidence is that during the last six years of the testator's life, which would extend back very nearly to the date of the will, he told her that he would remunerate her well for all she had done and was doing for him. The conveyance contained a reservation of a life estate in the testator. The lots 2, 3, and 4, which Mrs. Bissett took under the deed exclusively, were, with other lands of the testator, subject to a mortgage for six thousand dollars, and the conveyance was made expressly subject to the encumbrance of the mortgage. The value of these lots above the mortgage debt which was charged upon them does not appear.

It fully appears by the evidence that the testator intended to make Mrs. Bissett compensation for her services; that originally he proposed to do this by a codicil to his will, and that he afterwards resolved to make the deed in place of an

alteration of his will, and that he intended that she should have the property conveyed to her, in addition to what he had given her by the will, in consideration of the services she had rendered. The testimony on this subject is referred to by the vice-chancellor in his opinion. It would be superfluous to repeat it here. It is sufficient to say that the proof is plenary and conclusive that the testator did not intend by this conveyance to make a gift or advancement to Mrs. Bissett, and that his intention in making the conveyance was to make compensation to her for her services over and above the gifts to her by the will. The decision of the vice-chancellor that the conveyance was not a gift or advancement was correct.

The object of the second bill filed by the complainant was to compel Mrs. Bissett to make an election. By the will plots Nos. 2, 3, and 4 in East Brunswick were devised to the complainant. These lots were included in the deed of conveyance made by the testator to Mrs. Bissett.

The prayer of the bill is that the said Mrs. Bissett elect under which instrument, to wit, the said last will and testament, or the said deed of conveyance, to hold the said estate and the property therein bequeathed, devised, and conveyed respectively; and in case she elects to hold under the said last will the property therein devised and bequeathed to her, that she surrender up to be canceled the said deed; and in case she elects to hold under the said deed the said property therein granted and conveyed to her, that she surrender to the complainant all of the property so devised and bequeathed to her by the said last will, or make compensation to the complainant out of the estate devised and bequeathed to her by the said last will, in addition to the property set forth in the said deed, to an amount equal in value to the said estate devised to him.

Election is defined by Mr. Justice Story as "the obligation imposed upon a party to choose between two inconsistent rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both": 2 Story's Equity Jurisprudence, sec. 1075. The principle on which this doctrine rests is that, for the donee to accept the benefit conferred, while he declines the burden imposed, is to defraud the designs of the donor: 2 Story's Equity Jurisprudence, sec. 1077. The illustration of this doctrine, which is pertinent to the subject under dis-

cussion in this case, is where A by his will gives to B property which belongs to C, and by the same instrument gives to C other property which belongs to the testator, in such a case a court of equity will put C to an election to take under the will and give effect to all its provisions, or, if he choose to stand upon his property rights against the testator's disposition, equity will compel him to make compensation to the other beneficiary to the extent of indemnifying the latter for the loss he sustains by such election, not exceeding, however, the benefits the former receives under such testamentary disposition: 1 Jarman on Wills, 4th ed., 443, 445; 1 Pomeroy's Equity Jurisprudence, secs. 462, 464, 468, and notes.

The plots Nos. 2, 3, and 4, in East Brunswick, devised to the complainant, being included in the deed of conveyance to Mrs. Bissett, if the deed to her had been made before the testator's will was executed, the case would clearly have been a case for an election.

But the deed of conveyance to Mrs. Bissett was made after the execution of the testator's will.

By the common law an absolute conveyance of lands which were specifically devised, made after the execution of the will, operated as a revocation of the devise, for in such case the devisor does not die seised, and his alienation after making the devise is conclusive evidence of a change of intention with regard to such testamentary disposition: 6 Cruise's Digest, sec. 59, p. 93. So inflexible was this rule of the common law, that if the testator subsequently aliened lands devised and afterwards acquired a new freehold estate in the same lands, such newly acquired estate would not pass by the devise: 1 Jarman on Wills, 147; 4 Kent's Commentaries, 529, 530. In the latter respect the law has been changed in England by the statute 1 Vict., c. 26, secs. 23, 24, and in this state by section 8 of the wills act of March 12, 1851, the effect of which is to make a general or specific devise of lands operative to include lands acquired subsequent to the making of the will: Rev. Stats. 1248. Except as modified by statute, the common-law rule is in force and rests upon the principle [554] that the subsequent alienation of the property devised evinces a change of mind on the part of the testator, and is therefore a revocation of the devise; or, to speak with more accuracy, the testator having aliened the lands in his lifetime, has not at his death any estate therein to pass to the devisee

by his will. To adopt the language of Lord Hardwicke, the conveyance after the making of the will "is a revocation, because the estate is gone and the will has lost the subject of its operation": *Sparrow* v. *Hardcastle*, 7 Term Rep. 416, note.

In *Thompson* v. *Thompson*, 2 Strob. 48, the testator, by his will, devised the premises in question to the plaintiff. Subsequently he conveyed the same premises to the defendant by deed. The testator's will contained other legacies and devises to the defendant, which he had accepted. The contention was that the defendant was under an obligation to elect between the benefits given by the will and his title under the deed. The court held otherwise. The learned judge, in delivering the opinion of the court, said: "When the testator gives his own estate to one person, and the estate of that person to another, the intention is manifest that the second devisee shall have the estate of the first, and that intention creates a condition that the first devisee shall not take the estate given to him, unless he relinquish his own estate to the person to whom the testator has devised it. If, in this case, the testator had first conveyed the plantation to the defendant, and afterwards devised it to the plaintiff, the defendant could not take by the conveyance without defeating the devise to the plaintiff. To take his own estate by the deed, and, in addition, claim what was given by the will, would be against the intention of the testator, and the defendant would be put to an election either to take under the deed and relinquish his claim under the will, or to take under the will and relinquish to the devisee the plantation claimed by the deed. But the conveyance to the defendant was made after the date of the last codicil, and long after the date of the will. The testator thereby gave him the plantation, in addition to what was given by the will. By the conveyance to the defendant the devise to the plaintiff was revoked, with the same effect as if the plantation had been devised eo to the defendant by a codicil. It was the intention of the testator that the defendant should take both under the deed and under the will; and there is no subject for election."

During the lifetime of the testator his property and the disposition he should make of it were subjects entirely within his own control and at his discretion. By his will he intended that Mrs. Bissett should at his death have the property therein devised and bequeathed to her. By the deed of conveyance subsequently made to her for other property not

given to her by the will, he intended that she should have the property conveyed to her in addition to the devises and bequests to her contained in the will. The testator intended that she should enjoy the benefits conferred on her by both instruments. To compel her to renounce the benefits derived under either would defeat the plainly expressed intentions of the testator.

The decree in both cases should be affirmed.

ADVANCEMENTS—WHAT ARE.—An advancement is a gift by an ancestor of property which, but for the gift, would pass to an heir or distributee on the ancestor's death, or it is something purchased with his funds in the name or for the benefit of the heir: *Cazassa* v. *Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112. See the notes to the following cases where the subject is discussed and the cases defining advancements are collected: *Atkinson, Petitioner*, 27 Am. St. Rep. 748; *Brook* v. *Latimer*, 21 Am. St. Rep. 296, and *Miller's Appeal*, 80 Am. Dec. 559.

ADVANCEMENTS—PRESUMPTIONS—CONVEYANCE OF LAND BY PARENT.—A deed from a parent to a child for love and affection is presumed to be an advancement: *Hatch* v. *Straight*, 3 Conn. 31; 8 Am. Dec. 152, and note; *Scott* v. *Harris*, 127 Ind. 520. A purchase of land by a father in the name of his son is presumed to be an advancement: *White* v. *White*, 52 Ark. 188; *Higham* v. *Vanosdol*, 125 Ind. 74; *Smith* v. *Strahan*, 16 Tex. 314; 67 Am. Dec. 622, and note; *Bogy* v. *Roberts*, 48 Ark. 17; 3 Am. St. Rep. 211, and note. See the extended note to *Miller's Appeal*, 80 Am. Dec. 561.

WILLS—REVOCATION BY SUBSEQUENT CONVEYANCE.—A conveyance by a testator of all lands owned by him at the time of making his will operates as a revocation of the will: *Bowen* v. *Johnson*, 6 Ind. 110; 61 Am. Dec. 110, and note; to the same effect see *Cooper's Estate*, 4 Pa. St. 88; 45 Am. Dec. 673, and note. See a full discussion of this in the extended note to *Graham* v. *Burch*, 28 Am. St. Rep. 356, and the note to *Graves* v. *Sheldon*, 15 Am. Dec. 659.

CENTRAL TRUST COMPANY *v.* CONTINENTAL IRON WORKS.

[51 NEW JERSEY EQUITY, 606.]

MORTGAGES FOR FUTURE ADVANCES—PRIORITY OF LIENS.—Mortgages for future advances operate from the time of recording, although the advances are not made until a subsequent date, and they have priority for all advances made before actual notice of subsequent encumbrances.

MECHANICS' LIENS—MORTGAGE LIENS—PRIORITY.—When, between the time of the execution and recording of a mortgage and the issue of mortgage bonds thereon, a mechanic's lien attaches to the mortgaged premises, the holders of such mortgage bonds, without actual notice of the mechanic's lien, have a lien on the mortgaged premises relating back to the time when the mortgage was recorded, prior and superior to that of the mechanic's lien.

E. A. and W. T. Day, and J. P. Stockton, for the appellant.

Frank Bergen and William D. Edwards, for the respondents.

606 VAN SYCKEL, J. This writ is prosecuted for the foreclosure of a trust mortgage made by the Metropolitan Gas Light Company of Elizabeth, New Jersey, to the Central Trust Company of New York, trustee, to secure seven hundred bonds of five hundred dollars each. The mortgage is dated July 19, 1889, delivered the same day, and recorded July 22, 1889.

The mortgage is in the usual form of mortgages by corporations to secure the issue of bonds. It recites the resolution of the board of directors of the company, authorizing the issuing of the bonds, and the execution of the mortgage to secure the same.

The total amount of bonds authorized to be issued were sold and delivered to purchasers between September 20, 1889, and January 31, 1890.

Lien claimants claim priority over this mortgage. The excavation for the building erected upon the mortgaged premises was commenced July 29, 1889, being a date prior to the sale of any of the mortgage bonds.

By the decree below priority was given to these lien claims for work done and materials furnished for said building.

607 In this state mortgages for future advances operate from the time of recording, although the advances may not be made until a subsequent date, and they have priority for all advances made before actual notice of subsequent encumbrances: *Bell* v. *Fleming*, 12 N. J. Eq. 490; *Ward* v. *Cooke*, 17 N. J. Eq. 93; *Platt* v. *Griffith*, 27 N. J. Eq. 207; *Jacobus* v. *Mutual Ben. Life Ins. Co.*, 27 N. J. Eq. 604.

In *Platt* v. *Griffith*, 27 N. J. Eq. 207, there was a verbal agreement between the parties to the mortgage that it should secure future advances. The lien claims accrued before the advances under the mortgage were made, but the court held that the mortgage was entitled to priority for the full amount advanced.

In *Jacobus* v. *Mutual Ben. Life Ins. Co.*, 27 N. J. Eq. 604, the mechanics' liens attached May 28, 1870. The mortgage was dated May 2, 1870; recorded, but not delivered until July 7, 1870.

This court held that, although there was no delivery of the mortgage or advances made under it until after the lien claims had arisen, the encumbrance of the mortgage would relate to the date when it was recorded, and thus give it priority over the liens. In that case an agreement had been made to loan the money secured by the mortgage prior to its delivery, but I do not perceive how this fact could place the mortgagee in that case in a position of superior equity to that occupied by these bondholders, who are secured by a mortgage to trustees for the money they should thereafter advance upon it. It was made for the expressed purpose of securing money to be advanced, and differs only in the fact that, the future bondholders being unknown, the agreement to advance could not be made with them in person. It was, in substance and effect, made with the trustees named in the mortgage for the benefit of such bondholders, and equity should so regard it. They hold a stronger position than that in the Jacobus case in this respect: the mortgage to their trustees was made, recorded, and delivered prior to the commencement of the building, while in the Jacobus case there was no delivery until after the liens had attached.

Mr. Justice Depue, who delivered the opinion of a majority of the court in the Jacobus case, said that the object of the equitable doctrine adopted by the courts was to give effect to the intention of the parties, and that where several acts are necessary to make a complete conveyance as between the parties to it, if justice requires it, the conveyance will be regarded as having been made at the first act, to which all subsequent acts will have relation. The mere agreement to advance money in that case gave, of itself, no equity to the mortgagee, because he could have receded from his agreement when another lien was permitted by the mortgagor to intervene before he actually made the advance. The ground of equity was that the parties had entered into a legal contract which was partly executed, and that parties having notice of such contract must be subordinated to it, as if it had been entirely completed. That is the same principle which applies in enforcing contracts for the sale of land specifically. With the reason which underlies the rule in the Jacobus case in view, the case before us cannot be distinguished from it in principle. The maxim in equity is, that what has been agreed to be done shall, for the advancement of justice, be regarded as done. This case is within that rule. The mortgage was

given to secure money to be advanced for the purposes of the mortgagor by the purchasers of the mortgage bonds, and the intention of the parties announced substantially by the execution, recording, and delivery of the mortgage can be effectuated only by treating the transaction as a whole by relation as of the date of the mortgage.

This gives it priority over the mechanics' liens for the full issue of the bonds, because neither the complainants nor the bondholders had actual notice of the subsequent encumbrances.

The commencement of the building was constructive notice only, and not actual notice of the lien claims.

This court, in *Jacobus* v. *Mutual Ben. Life Ins. Co.*, 27 N. J. Eq. 604, expressly decided that such constructive notice would not postpone the mortgage debt.

Aside from these adjudications, the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions, and are treated, almost without exception, by the courts as a class by themselves, not subject, in all respects, to the stricter rules which pertain between natural persons.

[609] In *Claflin* v. *South Carolina R. R. Co.*, 4 Hughes, 12, 8 Fed. Rep. 118, the question was whether bonds which were part of an issue secured by a first mortgage, but which remained unissued in the hands of the mortgagor, could be issued, after the making of a second mortgage and issue of bonds thereunder, so as to preserve a lien superior to the issue of bonds under the second mortgage.

Chief Justice Waite, in maintaining the priority of the first mortgage bond, said: "Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company, their lien under the mortgage was suspended, but the moment they were out in the usual course of business, it again took effect as of the time when the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed."

The like view was taken by the supreme court of Iowa in *Nelson* v. *Iowa Eastern Railroad Co.*, 8 Am. R. R. Rep. 82. There, between the execution and recording of the mortgage and the issue of the bonds, a mechanic's lien attached to the mortgaged premises. The court of Iowa denied priority to the mechanics' liens, saying that: "If the purchaser of a bond in New York, in Amsterdam, or London is bound to inquire whether the bond in fact was executed by the company contemporaneously with the execution of the mortgage, or whether, before the signing or the negotiating of the bonds, liens of laborers or materialmen may not have attached to the road, it is apparent that the value of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed. The plaintiffs are affected with knowledge of the existence of the mortgage, and, seeing that the road had mortgaged all its future acquisitions, [610] they could and should have protected themselves by refusing to sell the ties without payment or security."

In *Reed's Appeal*, 122 Pa. St. 565, where the lien of the mortgage was held to be dominant, a distinction is clearly drawn between mortgages to secure bonds to be put upon the market and dealt with in commercial circles and a mortgage given by one man to another. The following is the language used by the court at page 573 of that case: "Where a mortgage is given to cover future advances of one man to another, it is not a matter of much inconvenience for the mortgagee to ascertain, from time to time, as he is called on for advances, whether there be intervening liens. But a different case is presented where a public improvement is undertaken, requiring the expenditure of large sums of money and the floating of a debt of great magnitude. The debt is necessarily divided into small parts and carried into different and distant markets. It would be out of the question to ascertain the state of the record or of the company's affairs each time a bond was about to be sold. If this were made the duty of purchasers it would prevent the sale of such securities altogether, or at least confine their purchase to such large concerns as could buy in bulk after due and careful inquiry; even then the facts would be open to doubt at every subsequent sale. Thus, their value would be entirely reduced."

The cases are referred to in Jones on Corporate Bonds and Mortgages, section 205.

If this well-established doctrine is shaken it will destroy the value of millions of securities of railroad and other corporations which have been negotiated on the faith of the priority of the mortgage which secures their issue.

In the case before us the lien claimants show no superior equity. They had full notice of the existence of the mortgage and the title which passed thereby to the trustee, and the purpose of the company to put the mortgage bonds upon the market for sale to *bona fide* purchasers without notice of the mechanic's lien. Charged with such knowledge, they took no active measures to restrain the issue of the bonds.

The act of March 4, 1879 (Rev. Supp., sec. 4, p. 456), has no [611] application to this case, as clearly appears from the preamble to that act and also by the provisions of the act.

In my opinion, the decree of the court below should be reversed and the priority of the mortgage bonds established.

MORTGAGES FOR FUTURE ADVANCES—PRIORITY.—A mortgage made in good faith to cover future advances of money or goods is valid where the amount of the liability is expressly limited, if it is properly recorded, as against subsequent encumbrances by mechanics' liens or otherwise, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance: *Tapia* v. *Demartini*, 77 Cal. 383; 11 Am. St. Rep. 288, and note. A mortgage to secure future indebtedness is valid, if recorded, as against a subsequent mortgage, and covers advances made after the subsequent mortgage, but before actual notice to the prior mortgagee to make no further advances: *McDaniels* v. *Colvin*, 16 Vt. 300; 42 Am. Dec. 512; *Nelson* v. *Boyce*, 7 J. J. Marsh. 401; 23 Am. Dec. 411. A mortgage given and recorded, when executed to secure advancements to be made to the mortgagor, will be upheld as against subsequent mortgagees, as to all advancements made prior to the execution of such subsequent mortgages: *Boswell* v. *Goodwin*, 31 Conn. 74; 81 Am. Dec. 169, and note. A mortgage given to secure future advances will be postponed as to such advances, to a second mortgage recorded before the advances were made: *Spader* v. *Lawler*, 17 Ohio, 371; 49 Am. Dec. 461, and note; *Ladue* v. *Detroit etc. R. R. Co.*, 13 Mich. 380; 87 Am. Dec. 759, and note.

MORTGAGES—MECHANICS' LIENS.—PRIORITY: See *Saunders* v. *Bennett*, 160 Mass. 48; 39 Am. St. Rep. 456; *Haxtun etc. Heater Co.* v. *Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note, with the cases collected; and *Beale* v. *Hurlbut*, 58 Conn 511.

DE HART *v.* CONDIT.

[51 NEW JERSEY EQUITY, 611.]

CONSTITUTIONAL LAW—JURY TRIAL—LUNACY.—A statute providing that a commission *de lunatico inquirendo* shall be executed before a jury of twelve men does not violate the right of trial by a jury of twenty-four men as guaranteed by the constitution.

LUNACY—JURY TRIAL.—A finding of lunacy concurred in by twelve jurymen is not defeated by the fact that only eleven of them visited the alleged lunatic for personal examination.

LUNACY—FINDING OF—RIGHT TO TRAVERSE.—When a reasonable doubt exists as to the propriety of a finding of lunacy made by a jury, the alleged lunatic should be allowed to traverse the inquisition.

John Whitehead, for the appellant.

James E. Howell, for the respondent.

[611] DIXON, J. Upon a petition presented to the chancellor in June, 1892, a commission in the nature of a writ *de lunatico inquirendo* was [612] issued, to ascertain whether Charles A. De Hart was a lunatic or of unsound mind, and in the following month an inquisition was returned into chancery, finding that Mr. De Hart was then, and for the space of about five years preceding had been, of unsound mind, so as to be incapable of governing himself, his lands, tenements, goods, and chattels. Within a few days Mr. De Hart presented to the chancellor a petition asking that the inquisition be set aside, or, in case that should be refused, that he be permitted to traverse the inquisition. In December, 1892, the chancellor made an order denying these requests and affirming the proceedings taken upon the commission. From that order Mr. De Hart appeals to this court.

The grounds upon which counsel for the appellant contends in this court that the inquisition should be set aside are: 1. That the jury consisted of but twelve men; and 2. That of these only eleven attended at a personal inspection of the alleged lunatic, although all the twelve concurred in the finding.

An act concerning idiots, lunatics, etc., approved March 23, 1887 (Pub. Laws of 1887, p. 48), directs the sheriff to summon only twelve jurors, instead of twenty-four, to inquire into and find the truth of the matters involved in a commission relating to the competency of such persons. But it is insisted that this act violates the right of trial by jury as guaranteed by the constitution.

If we assume that the constitutional provision applies to proceedings of this nature, still this statute does not infringe upon it, for the reason that, prior to the adoption of the constitution, the party had no right to trial by more than twelve jurors.

"By the old common law," says Blackstone (1 Blackstone's Commentaries, 303), "there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not, which must be tried by a jury of twelve men"; and (page 305) "the method of proving a man *non compos* is very similar to that of proving him an idiot." In speaking of inquisitions or inquests of office generally the same author says (3 Blackstone's Commentaries, 258) that the inquiry is made "by a jury of no determinate number, being either twelve or less, or more." The sufficiency of twelve men to constitute a jury in such cases [613] is asserted by other writers on the subject (Collinson on Lunacy, 153; Shelford on Lunacy, 117; Buswell on Insanity, sec. 63), and was adjudged by the chancellor in *Lindsley's case*, 46 N. J. Eq. 358. In practice, any number not less than twelve nor over twenty-three has been considered adequate. In *Ex parte Ferne*, 5 Ves. 450, seventeen jurors; in *Dey's case*, 9 N. J. Eq. 181, twenty-three jurors, and in *Van Auken's case*, 10 N. J. Eq. 186, twenty-one jurors were sworn.

The inquisition should not be disturbed on this ground.

Nor should the fact that only eleven jurors visited Mr. De Hart for personal examination defeat the finding. The presence of all the jurors at such an examination is not necessary: *Smith's case*, 1 Swanst. 4, 6; *Child's case*, 16 N. J. Eq. 498, 499.

The question whether the alleged lunatic should be allowed to traverse the inquisition must next be considered.

As pointed out by the chancellor in *Lindsley's case*, 46 N. J. Eq. 358, the traverse of such an inquisition was, in England, deemed a matter of right under the statute 2 and 3 Edw. VI., c. 8, and, on an application of the alleged lunatic to traverse, the duty of the court consisted merely in ascertaining that the application was an act of the free will of a person capable of forming and expressing such a volition: *In re Cumming*, 1 De Gex, M. & G. 537. But that statute not having been adopted in the United States the right was here denied at an early day. In *Matter of Wendell*, 1 Johns. Ch. 600, Chancellor Kent, said: "The care and custody of idiots and

lunatics being confided to this court, the whole control of the inquisition and the manner in which that control should be exercised would seem to depend entirely on the discretion of the court." In New Jersey, by a statute passed November 21, 1794 (Patterson's Rev. Laws, p. 125), it was enacted that the chancellor should have the care and provide for the safe-keeping of all idiots and lunatics and of their lands and tenements, goods, and chattels; and it is probable that upon this statute was founded the practice in this state of regarding the application to traverse, just as Chancellor Kent regarded it on similar grounds in New York, as addressed to judicial discretion: *Covenhoven's case*, 1 N. J. Eq. 19; *Van Auken's case*, 10 N. J. Eq. 186; *James' case*, 36 N. J. Eq. 547. According to this [614] practice, if there be a reasonable doubt as to the petitioner's unsoundness of mind, the traverse should be allowed: *In re Russell*, 1 Barb. Ch. 38, and New Jersey cases last cited.

It appears that, at the time of the inquisition in July, 1892, Mr. De Hart was in his eighty-second year; that in the year 1887 he had a slight stroke of apoplexy, after which he exhibited a marked lack of memory, especially with regard to recent occurrences; that up to April, 1892, he had been a member of a firm engaged in the business of manufacturing edged tools, which, however, for four or five years preceding, had been chiefly carried on by his partners; that, nevertheless, he had been generally consulted about the partnership affairs as long as the firm continued, and in March, 1892, had taken an active and decisive part in negotiating the sale of his interest in the business; that at no time had it been suggested among his friends that his personal liberty should be restrained; and that he had always, in his household and neighborhood, been treated as an intelligent person, quite capable of forming and expressing rational opinions on matters discussed in his presence.

Under these circumstances we think there is reasonable doubt whether the infirmity of his memory is such as to indicate that unsoundness of mind which renders one unfit for the government of himself as well as of his property, and without which the courts are not justified in placing a man and his estate under guardianship: *Lindsley's case*, 44 N. J. Eq. 564; 6 Am. St. Rep. 913. In old age inability to attend to the details of business, arising from defective memory and similar causes, is to be expected, but it is protected from

serious loss more humanely by the ministrations of friends than by legal proceedings, which virtually take away the rights of property and of self-government.

The order of the chancellor should be reversed and the case remitted, with directions that the appellant be permitted to traverse the inquisition.

INSANE PERSONS—INQUISITION—COMMISSION.—Under a statute requiring that a commission of lunacy shall be directed to eighteen, any twelve of whom shall execute it, the fact that thirteen acted does not vitiate it: *Field v. Lucas*, 21 Ga. 447; 68 Am. Dec. 465. The unanimous verdict of a jury of twelve men upon a lunacy inquest although agreeably to the act of March 23, 1887, only twelve jurors be summoned, is sufficient: *Lindsley's case*, 46 N. J. Eq. 358. In *Perrine's case*, 41 N. J. Eq. 409, the inquisition was signed by nineteen jurors.

INSANE PERSONS—INQUISITION—RIGHT TO TRAVERSE FINDING.—The traverse of an inquisition by an alleged lunatic can be had not as a matter of right but upon the exercise of sound judicial discretion: *Lindsley's case*, 46 N. J. Eq. 358; *Matter of Christie*, 5 Paige, 242. A person found lunatic by inquisition has legal capacity to bring an action to traverse the inquisition: *Walker v. Russell*, 10 S. C. 82. The effect of the finding of the inquisition is *prima facie*, and on the trial of the traverse the burden is on the respondent: *McGinnis v. Commonwealth*, 74 Pa. St. 245. See the note to *Field v. Lucas*, 68 Am. Dec. 468.

FRENCHE *v.* CHANCELLOR OF NEW JERSEY.

[51 NEW JERSEY EQUITY, 634.]

VENDOR AND VENDEE—SALE OF LAND—"MORE OR LESS."—When land is sold as containing so many acres, "more or less," and the quantity falls short or overruns a little on actual survey and estimation, no compensation is to be given to either party in the absence of proof of fraud.

Charles M. Woodruff, for the appellant.

S. M. Dickinson, for the respondent.

634 BIRD, V. C. This bill is filed to foreclose a mortgage. In 1881 the heirs at law of William Rea, deceased, filed their bill for the partition of lands, which descended to them upon his death. The result of these proceedings was a sale of the lands free from their mother's right of dower. They secured to her her interest by giving to the chancellor this mortgage, conditioned that the interest should be paid to her. William, one of the heirs at law, became the purchaser. In 1889 he died without children, never having married. His brothers and sisters being his heirs at law, again took proceedings in

this court for partition of the same [625] lands, and a sale was finally ordered. At such sale defendant Frenche became the purchaser, and, as part of the consideration money, assumed the payment of the said mortgage.

The defendant resists the payment of the whole amount due upon the said mortgage, and files a cross-bill, in and by which he claims that he purchased the said land by the acre, and paid for it by the acre at the rate of 195 $\frac{22}{100}$ acres, and insists that there were not so many acres conveyed to him, because of which he is entitled to a deduction from the whole amount of said mortgage equal to the value of the number of acres less than 195 $\frac{22}{100}$ acres, at the rate per acre at which he bid. He also, by his cross-bill, claims deduction for a large number of acres which it is alleged were and are a great portion of the time overflowed or submerged by water because of an artificial dam which was raised in the construction of the Morris canal, which renders so much of the land comparatively worthless.

In the cross-bill the allegation is that the quantity of acres less than the amount named in the deed, and less than the amount offered at the sale, and for which payment was made, is twenty-two. The complainant insists that a fair construction of the surveys shows that there is no deficiency.

Under the most liberal interpretation it is difficult to calculate a deficiency exceeding 4 $\frac{22}{100}$ acres, and this is all that was finally insisted upon by the counsel of the defendant. To reach this amount, highways and byroads, as well as a parcel of land sold by William Rea in his lifetime, are included.

At the sale, according to the conditions, and according to the report of the master who made the sale, the number of acres offered was 195 $\frac{22}{100}$. In the deed it is declared that the property was sold by the acre, and that the quantity was 195 $\frac{22}{100}$ acres. The description of the premises in the deed concludes thus: "Containing 195 $\frac{22}{100}$ acres, be the same more or less."

[626] The defendant, upon final hearing, abandoned his claim of a deduction of the value of 22 acres, and limited it to 4 $\frac{22}{100}$ acres. All of this but 1 $\frac{55}{100}$ acres is claimed to be highways and byroads crossing said tract. Twenty-one one-hundredths of an acre thereof is not inclosed by the division fence separating these lands from Brattleford's, but which would be included in case the fence were placed upon the

McKnight, 40 Ohio St. 341, the court decided that a deficiency of 5¼ acres at $55 per acre was too much for the vendee to bear, which it will be seen was more favorable to the vendee than in the case of *Melick* v. *Dayton*, 34 N. J. Eq. 245, considering the number of acres and the amount given for the land. In the case of *Wilson* v. *Randall*, 67 N. Y. 338, the sale was by the acre, and the vendor, after the survey, claimed that there were $56\frac{15}{100}$ acres, whereas it afterwards turned out that there were only $48\frac{47}{100}$ acres; the price agreed upon per acre was $350. The court allowed the recovery of the excess paid for the number of acres above the true quantity, notwithstanding the addition of the phrase "more or less" added to the description of the property in the deed. To the same effect is *Tarbell* v. *Bowman*, 103 Mass. 341.

It will be seen from all the authorities that the value or price per acre agreed upon has much to do with the judgment of the court in determining the rights of the parties. But that value or price, so far as I can learn, is determined by the agreement, and is fixed at the rate per acre therein specified, and not at the [629] valuation which a particular portion of the premises may be supposed to be worth at the time of the hearing. This rule seems to me to be reasonable from every standpoint: *Nelson* v. *Matthews*, 2 Hen. & M. 164; 3 Am. Dec. 620; *Hundley* v. *Lyon*, 5 Munf. 342; 7 Am. Dec. 685; *Nelson* v. *Carrington*, 4 Munf. 332; 6 Am. Dec. 519; *McCoun* v. *Delany*, 3 Bibb. 46; 6 Am. Dec. 635; *Harrell* v. *Hill*, 19 Ark. 102; 68 Am. Dec. 202. If this be the true view, then according to the defendant's own showing there is a deficiency of only $1\frac{47}{100}$ acres, for which he agreed to pay $87.76. This, it seems to me, may fairly be regarded as covered by the phrase "more or less," and not such a deficiency as to entitle the defendant to relief. I fully agree with the observations of the court in the case of *Whaley* v. *Eliot*, 1 A. K. Marsh. 343, 10 Am. Dec. 737, when it says: "Good policy requires that too easy an ear should not be given in such cases." I think this observation is applicable to this case. The only deficiency which can properly be so regarded is $1\frac{47}{100}$ acres. I do not forget that the defendant insists that this is worth several hundred dollars, because of its location, and that he claims a certain particular quantity because it is inclosed with fences, as embracing this $1\frac{47}{100}$ acres. With respect to this particular quantity it should be said that it was sold and conveyed to the railroad company by the an-

cestor of the parties to the partition proceedings, under which the defendant took title, and was embraced in the first description in the deed, out of which were excepted in the same deed several parcels, but in making such exceptions this small quantity was omitted. This conveyance to the railroad company, I believe, is a matter of record, of which the defendant had notice. Under the circumstances, notwithstanding the claim of the defendant that he is entitled to a rebate of several hundred dollars for this parcel, I feel it my duty to apply the rule above stated, and to estimate it at the value per acre paid for the whole tract, which was $27.56 per acre, making for the $1\frac{81}{100}$ acres $37.76. It is well settled that courts of chancery do not take cognizance of such inconsiderable demands: [cases] *Swedesborough Church* v. *Shivers*, 16 N. J. Eq. 453; *Allen* v. *Demarest*, 41 N. J. Eq. 162.

The cross-bill should be dismissed, with costs. The complainant is entitled to a decree for the whole amount due upon his mortgage, with costs.

MEANING OF WORDS "MORE OR LESS": See *Oakes* v. *De Lancey*, 133 N. Y. 227; 28 Am. St. Rep. 623, and note, with the cases collected.

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

GILMORE *v.* HAM.

[142 NEW YORK, 1.]

LIMITATIONS—EQUITABLE PROCEEDINGS.—The statute of New York attaching limitations to numerous classes of actions, and then adding "an action, the limitation of which is not specifically prescribed in this or the last title, must be commenced within ten years after the cause of action accrues," subjects all actions, whether legal or equitable, to some statutory limitation.

PARTNERSHIP.—A LIQUIDATING PARTNER after the dissolution of a partnership becomes its sole agent for the purpose of winding up its affairs, but no new authority is given him. He is merely the agent of the partnership for the one specific purpose, and must perform his duty with reasonable diligence, and, while he so performs it, no cause of action in favor of the retiring partner can arise.

PARTNERSHIP.—A CAUSE OF ACTION AGAINST A LIQUIDATING PARTNER for an accounting does not arise at the moment of the dissolution, nor, on the other hand, is it necessarily postponed to the complete and final ending of the partnership business. Such cause of action accrues after the liquidating partner, under the circumstances of the particular case, has had a reasonable time within which to perform his duty, when it ought to be fully completed, and when he is in fault if it is not.

PARTNERSHIP.—THE STATUTE OF LIMITATIONS RUNS AGAINST A SUIT BY A RETIRING PARTNER against a liquidating partner for an accounting, from the date when it was the duty of the latter to have had the business in a condition for its complete settlement, and the operation of the statute is not postponed by the fact that he leaves one or more of the partnership obligations unsettled, which are subsequently enforced in an action against the retiring partner by which he is compelled to pay the amount thereof.

ACTION for an accounting and contribution between partners commenced in the year 1890. The decision in favor of plaintiff was affirmed by the general term of the supreme court upon appeal.

T. K. Fuller, for the appellant.

John C. Hunt, for the respondent.

[3] FINCH, J. Under what circumstances and from what date the statute of limitations runs in favor of a liquidating partner as against the retiring partner suing for an accounting and payment of his share, is the question presented on this appeal. [4] That it is a troublesome and perhaps difficult inquiry is obvious from the varying and shifting circumstances upon which it may arise, and still more from a study of the conflicting decisions which have striven by very different methods to reach a definite solution of the problem. That it has some degree of importance and should be determined carefully is apparent from the fact that it must necessarily settle when the cause of action for an accounting accrues and can be enforced, and so when the liquidating partner is in default. It is desirable to state first, as definitely as possible, the facts upon which the question arises.

Ham and Gilmore became partners in the clothing business in March of 1864, and conducted the business until June, 1869, when Gilmore went away and left the state. Ham says he "absconded," and claims that previous to his departure he had been secretly disposing of the partnership goods for his own benefit, and disappeared to avoid detection. Whether that be true or not, we must assume that Gilmore abandoned the partnership, and that his action amounted to a consent to its dissolution, and the appointment of Ham as the sole liquidating partner, authorized to settle the partnership affairs. For, shortly after Gilmore's departure, Ham published a notice of the dissolution of the firm, and that he would close its affairs, and Gilmore's assent is to be inferred not only from his conduct at the time, but from his long silence and from his adoption of Ham's action involved in the institution of the present suit. We are to treat the case, therefore, precisely as if there had been a dissolution by mutual consent, and Ham had been appointed the liquidating partner alone authorized to close up the business. He took that attitude; was allowed to take it; received and held all the assets; and assumed rightfully the duty of winding up the partnership affairs. What he did in that direction we know very imperfectly, because he chooses not to render an account. It appears, however, that in 1871 he sold out and received his pay for the whole stock of goods then in his possession, and which must

have covered the entire assets of the dissolved firm, except, perhaps, its bills receivable. The latter, so far as collectible, we may and should assume had been collected during the two years which had elapsed since the dissolution. As to the debts owing by the firm and payable out of its assets, we have only the statement of Ham, that at the date of his sale of the stock of goods he had paid "a good many" of the debts of the firm, but did not know whether he had paid them all. One, at least, he had not paid. That was a note given by Ham and Gilmore to the wife of the former, for six hundred and seventy-five dollars, dated December 19, 1866, and payable one day after date. That note might have been, and should have been, paid in 1871 when the liquidating partner had turned all the assets into money, and, as the case shows, had ample means of the partnership in his possession adequate to that payment, and his omission to pay it was a clear violation of his duty. I am confident that, at that date, two years after the dissolution, when all the assets had been turned into money, when most of the debts had been paid, and when all of them ought to have been paid, the retiring partner could have maintained an action against the liquidating partner for an accounting of the partnership affairs and payment over of the share ascertained; and that it would not have been a defense to the suit that the retiring partner's cause of action had not accrued because one or more debts had been needlessly left unpaid. This conclusion, however, is adverse to some of the decisions, and will need consideration at a more convenient stage of the discussion.

What further happened was this: The note held by Mrs. Ham was sued in 1886, about twenty years after its maturity; service was made on Gilmore, who alone defended; the statute of limitations did not protect him because of his continued absence from the state; judgment went against him, and he was compelled to pay the full amount of the note, with its accrued interest; and thereupon he commenced this action. It has two phases. The complaint, alleging the compulsory payment of the note, demands contribution from Ham of the one-half chargeable against him, and for that there has been a recovery. Whether, upon proper allegations, there might not have been a judgment for the whole amount paid, need not be considered, since no such claim was made and no such relief was asked. The further cause of action pleaded was

for an accounting of the partnership affairs, and payment of the share found due, and to that the defendant pleaded both the six year and the ten year limitation, and has succeeded. The plaintiff appeals, and insists that he is entitled to an accounting, notwithstanding the lapse of time, and mainly upon the ground that the statute did not begin to run until all the business of the partnership was settled up and ended, for which contention he furnishes more or less of authority.

Under the law of this state there is a fixed limitation for every cause of action, whether legal or equitable. After attaching suitable limitations to numerous classes of actions the code adds (sec. 388): "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues." This provision, in the code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation: *De Pierres* v. *Thorn*, 4 Bosw. 288, 289; *Loder* v. *Hatfield*, 71 N. Y. 104. So far as I have examined the authorities in this state since the adoption of the code, I have found no denial of the application of its provisions to any form of equitable action, unless cases of a continuing right, accruing newly every day, may be said to form an exception (*Miner* v. *Beekman*, 50 N. Y. 343; *Schoener* v. *Lissauer*, 107 N. Y. 117), although it is quite apparent that they are not inconsistent with the uniform and universal rule. They serve, not to break it, but to show how difficult it occasionally is to determine when the right to the equitable relief arises, and when the cause of action so accrues as to set running the appropriate limitation. I shall assume, therefore, that either the six year or the ten year limitation applied to the plaintiff's cause of action, and need not for present purposes determine which.

When, then, did the plaintiff's cause of action accrue, for that is the date from which the limitation begins to run, and which we must fix in some manner in order to reach a result. I said in *Gray* v. *Green*, 125 N. Y. 206, that when an action is brought against a liquidating partner for an accounting the plaintiff must wait a reasonable time after the dissolution before his right of action can at all accrue, and, while the statement was not then essential to the decision, a further examination of the question in the present case has served to confirm that opinion. A cause of action originates in some

violation of a legal duty or some omission to perform it. The duty imposed upon the liquidator is one of agency. He becomes the sole authorized agent of the partnership for the single purpose of winding up and finally settling its affairs. There are elements of trust in his position and duty which lead us often to regard and describe him as a trustee for the creditors on the one hand or the retiring partner on the other, and the description is not inappropriate so long as it does not mislead us into the error of regarding the position and duty of the liquidator as that belonging to a direct trust. His authority is not such. No new authority is given to him. What he has is a restricted and narrowed part of that which the partnership conferred. That continues and subsists to the extent necessary for a settlement of the business, and is not a new authority or a direct trust: *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417; *Adams* v. *Taylor*, 14 Ark. 66. The liquidator becomes the agent of the partnership for the one specific purpose. His duty is to collect and adjust the debts due to the firm, to turn the assets into money, to pay and discharge the outstanding liabilities, and then to pay over to the other partner his just share of the remaining surplus: Story on Partnership, sec. 328. But he must perform this duty with reasonable diligence (*Evans* v. *Evans*, 9 Paige, 180), and while so acting, and in good faith, equity will not interfere, and no cause of action in favor of the retiring partner can or will arise. Obviously, such a cause of action will accrue, not at once upon the dissolution, but at some later period when there [8] has been such violation or neglect of duty as to justify equitable interference.

While, therefore, it is clear that the cause of action for an accounting does not arise at the moment of the dissolution, it is not necessarily postponed to the other extreme of a complete and final ending of all the partnership business. That view is taken in some of the adjudged cases (*Hendy* v. *March*, 75 Cal. 567; *Hammond* v. *Hammond*, 20 Ga. 560), but I do not think it is intended to be asserted as an absolute rule, always applicable irrespective of circumstances. Indeed, in *Prentice* v. *Elliott*, 72 Ga. 156, it is again stated, but with the qualification that the statute might begin to run when "a sufficient time had elapsed to raise the presumption" that the business had been fully settled. If by these cases and others like them it is only meant to say that a final share cannot be recovered until it is ascertained and exists, and that the

liquidator, doing his duty diligently and in good faith, will not be disturbed until the surplus is ready for distribution, we may and should concur in it as a general proposition. I think that, and no more than that, is meant by the opinion of the federal court in *Riddle* v. *Whitehill*, 135 U. S. 621, which is cited in support of a much broader doctrine. It holds that the right of action for an accounting does not arise at the date of the dissolution; that it does not accrue at all while the liquidator is doing his duty without antagonism between the partners or cause for judicial interference; and that when the right of action accrues and the statute begins to run "depends upon circumstances." I see no reason to doubt the accuracy of that doctrine, and am content to follow it as I have stated it.

We must, therefore, avoid the two extremes, which are that the statute begins to run at the date of the dissolution, and does not begin to run until the last item of partnership business is settled and closed; and determine when and how it may attach during the interval. The liquidator is bound to be diligent. He violates his duty when, without cause or reason, he prolongs the period of settlement. He is not at liberty, through negligence or purposely, to keep the retiring partner • or the representatives of one deceased out of their rights, or needlessly to postpone the ultimate distribution. If he does that equity may interfere, and, if no other measure will answer, may take the settlement into its own hands. I think, therefore, the right of action for an accounting accrues when the liquidator, under the circumstances of the particular case, has had a reasonable time within which to perform his duty, when it ought to have been fully completed, and when the liquidator is in fault if it is not. It cannot be and must not be that he may stretch the period of settlement at his will, and, leaving one or more debts unpaid, hold the assets in the peril of his continued solvency through long years, defying all equitable redress. I should be glad if it were possible to adopt some more definite rule than the one I have stated, but only specific legislation can give us that. Meantime, in each specific case, taking into consideration all the attendant circumstances, we must determine when the cause of action accrues.

In the present case that is not difficult. Ham's duty as liquidator was simple and easy. There were no complications to hinder or delay it. The goods could be sold, the

accounts be collected, and the debts be paid within two years from the date of the dissolution, which is a longer period than that allowed an executor or administrator before he becomes liable to account. Within that period the assets were in fact sold; the debts due to the firm presumably collected; its liabilities all paid except the note to Mrs. Ham; and that was due and should have been paid, and its further postponement was a negligent or intended violation of duty. I have not the least doubt that Gilmore's right of action for an accounting and a recovery of his share of the surplus accrued at that date, and could have been successfully maintained. Since almost twenty years elapsed from that date before the present action was commenced, it is clear that the statute is a defense, and has barred the right.

There are some answers to that conclusion which demand further consideration. One of them is founded upon the doctrine applicable to trusts that the statute does not run [10] upon them until they are openly repudiated by the trustee. Without pausing to consider the scope and limitations of that doctrine, it is enough for present purposes to repeat what I have already said, that the agency of the liquidator is not a direct trust, and the rule asserted applies only to such. In *Lammer* v. *Stoddard*, 103 N. Y. 672, we described the doctrine as applicable against a trustee of an actual, express, and subsisting trust, but held that where the trustee became such by implication or construction, the statute ran from the date of the wrong which raised the implication. It may be added that even in the case of a direct trust, the statute will begin to run when it ends, and the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over or transfer it discharged from the trust.

A further answer is found in the suggestion that whatever may be the right of the retiring partner to sue for an accounting, the liquidating partner cannot avail himself of the statute until he has completed the liquidation. The argument is, that the law gives him a reasonable time; that if he takes more, or is allowed to take more, he at least cannot complain; and that the statute does not mean to reward his negligence, nor punish the grace of his copartner. The trouble about this argument seems to me twofold: It disregards the mandate of the enactment which makes the date of the accruing of the cause of action the point of time from which the statute begins to run and substitutes an entirely different

and inconsistent date. We have no right to disregard the plain terms of the law, but must obey them as well as we can. And to the further idea that it was not intended to reward the negligence of the liquidator, or enable him to take advantage of his own wrong, the obvious answer is, that the doctrine would repeal the statute in every case. He who pleads the statute is always taking advantage of his own wrong in the sense that it is invariably his own default, his neglect, or wrongful act, which originates a cause of action against himself, and so sets the statute of limitations running. The law does not intend to reward one or punish the other, but goes upon a broad ground [11] of public policy, which aims to end litigation within periods which are fair and just to both parties. On the one hand, the liquidator must act promptly and diligently, and not seek to drag the settlement out through long years for his own convenience, or in disregard of the rights of his copartner; and on the other, the latter must not sleep on his rights, and wait till books are lost, or vouchers mislaid, or witnesses dead, before seeking an accounting and payment.

While it would not displease us to compel this defendant to account, we must refuse to do so in obedience to the law.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

The Powers, Rights, Liabilities, and Remedies of Partners after the Dissolution of the Firm.*

Upon the death of one of the members of the partnership it is thereby dissolved, and the title to the personal assets vests in the survivor or survivors, upon whom also devolve the powers and rights before such death, appertaining to the members of the whole firm: *Russell* v. *McCall*, 141 N. Y. 437; 38 Am. St. Rep. 807. It is not the purpose of this note to give any special attention to that part of the law of partnership applicable to the relations between a surviving partner and the representative heirs, or other successors in interest of a deceased partner, or to show what are the special powers, rights, duties, or liabilities of surviving partners. Those subjects have already received treatment in the note on proceedings against the representatives of deceased partners to enforce partnership liabilities: 77 Am. Dec. 114–117; on the liability of such representative for carrying on the partnership business: 86 Am. Dec. 600–602;

*REFERENCE TO MONOGRAPHIC NOTES.

Notice of dissolution, what sufficient: 26 Am. Dec. 290–293.

On a partner's power after dissolution: 6 Am. Dec. 574–576.

Acknowledgments and new promises by a partner after dissolution: 81 Am. Dec. 330–332.

Powers and duties of surviving partners: 65 Am. Dec. 295–303.

on the powers and duties of surviving partners: 65 Am. Dec. 295–303. This note is addressed to cases in which, though there has been a dissolution, all the partners are still living.

Dissolution Results in a Limited Partnership for Closing Purposes.—It is somewhat difficult to describe the precise relations of partners after the dissolution of the firm and while all of them continue to have an interest in its affairs. As to their property, they have sometimes been said to be tenants in common, but it is certain that their rights and powers differ essentially from those of such cotenants. They are, in effect, still partners, but their partnership does not extend to new business, and, in the absence of an agreement to the contrary, exists solely for the purpose of closing business by collecting all indebtedness due to, and discharging all obligations due from, the firm, and disposing of the property with a view to meeting such obligations, and to reach a condition where a division can be had between the partners of all the remaining assets, and the partnership relations thus finally and absolutely terminated. In other words, the old partnership is terminated, and its place taken by a new or modified partnership, the sole purpose of which, in the absence of special stipulations, is the collection of the assets and the discharging of the obligations of the old firm, and the final distribution of the net balance among the parties entitled thereto, and whenever the rights or powers of either of the partners are called in question attention must be given to the existence of this limited partnership, and the act sustained when legitimately included within its purposes, and denied effect when falling without or extending beyond those purposes. For the purposes which the partners may lawfully seek, the power of each continues as before. Upon the dissolution the right to take new business, or to enter into new engagements of any character, except when looking to the closing of the business and the preservation of the property, terminates, and hence any act of either of the partners in making new contracts or engagements, except those of the character indicated, binds himself alone; and, on the other hand, any acts of his in the line of duty remaining to the partners after such dissolution binds them all. Otherwise it would not be possible to do any necessary act towards closing the partnership business without the consent of all the partners. "Whilst each partner may bind the partnership by his contracts in any matter within the limits of the partnership, he cannot bind it by any contract beyond those limits; and the dissolution of the partnership puts an end to his authority. This may be stated as the general rule, a well-defined exception to which exists where the partnership has contracted engagements which cannot be fulfilled during its existence, in which case, for the purpose of making good such outstanding engagements, of taking and settling all accounts, and collecting all the property, means, and assets of the partnership existing at the time of its dissolution, for the benefit of all interested, the partnership must continue, although for all other purposes it is actually dissolved. In the fulfillment of outstanding engagements of the firm, and in the settlement of its business generally, the authority of each member remains the same as before the dissolution: *Western Stage Co.* v. *Walker*, 2 Iowa, 504; 65 Am. Dec. 789; *Brown* v. *Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618; *King* v. *Smith*, 4 Car. & P. 108; *Gram* v. *Cadwell*, 5 Cow. 493; *Arton* v. *Booth*, 4 J. B. Moore, 192; *Murray* v. *Mumford*, 6 Cow. 441. "It may be affirmed that a partnership, though dissolved for future operations, remains in force for closing the concern, and that the liquidating partner retains his former power to bind the firm in all things within the scope of the business com-

mitted to him. The proper limitation to the exercise of it is that it be restrained to the act or acts necessary to be done for the beneficial transaction of it": *Houser* v. *Irvine*, 3 Watts & S. 345; 38 Am. Dec. 768; *Ferreira* v. *Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496.

Whether the Late Partners are Cotenants.—It has been said that the "moment the partnership ceases the partners become distinct persons; they are tenants in common of the partnership property undisposed of from that period": *Abel* v. *Sutton*, 3 Esp. 108. Perhaps to call them tenants in common will describe their property rights as clearly as any other term, but their relation to one another and their authority over the property is essentially different from that of tenants in common. If they had no powers other than those of tenants in common no transfer or sale could be made of any of the assets of the late firm except with the consent of all its members, and some of the decisions do so hold: *Stair* v. *Richardson*, 108 Ind. 432. After the debts of the partnership have been paid so that there is no longer any necessity of selling partnership property and no reason why the law ordinarily applicable to a tenancy in common should not be applied, it is perhaps true that one of the late partners has no authority to sell the property without the consent of the others: *Hogendobler* v. *Lyon*, 12 Kan. 276. While, however, there is a necessity of disposing of the property to meet partnership obligations, the title to it is essentially of a partnership character rather than of the character of cotenancy, and includes the power of either partner to dispose of it for partnership purposes: *Rice* v. *McMartin*, 39 Conn. 573; *Yale* v. *Eames*, 1 Met. 486.

Sales and Other Transfers of Property by a Member of a Dissolved Partnership must, within the principles heretofore stated, be upheld when necessary for any partnership purpose such as raising moneys with which to pay debts and the like: *Morse* v. *Bellows*, 7 N. H. 549; 28 Am. Dec. 372; *Milliken* v. *Loring*, 37 Me. 408; *Thursby* v. *Lidgerwood*, 69 N. Y. 198; *Bennett* v. *Buchan*, 61 N. Y. 222; and, in the absence of any evidence to the contrary, a transfer by such a partner will be presumed to have been for some authorized purpose and therefore is at least *prima facie* valid: *Bach* v. *State Ins. Co.*, 64 Iowa, 595. If there is no necessity for the sale, a more difficult question arises and one upon which the adjudged cases do not speak either clearly or harmoniously. A third person cannot be presumed to have knowledge of the state of the partnership accounts, nor do we think he is under any obligation to make inquiry for the purpose of determining whether the affairs of the late partnership are in such a condition that its business might be closed and the partnership assets distributed without making any further sales or transfers of its property. A sale made by one of the late partners should therefore be sustained if the purchaser acts in good faith, whether any debts of the firm remain unpaid or not: *Robbins* v. *Fuller*, 24 N. Y. 576.

In what we have said affirming the power of a partner after the dissolution of a firm to transfer its property we do not wish to be understood as stating that he has any greater authority than existed during the continuance of the firm. The authority of a partner to dispose of partnership assets does not ordinarily extend to real property. This, though purchased in the name of the partners and with the funds of the firm and intended to be partnership assets, is at law deemed to be the property of the members of the firm in whose name the conveyance has been taken, and the legal title cannot be conveyed except as in other conveyances of real property held by cotenants, to wit, by an instrument executed by all the parties with the same formalities as if each held an estate in severalty: Freeman on Coten-

ancy and Partition, sec. 119; *Ruffner* v. *McConnell*, 17 Ill. 212; 63 Am. Dec. 362; *Chester* v. *Dickerson*, 54 N. Y. 10; 13 Am. Rep. 550; *Van Brunt* v. *Applegate*, 44 N. Y. 544.

The Indorsement of Negotiable Paper may be considered first as a contract involving liability on the part of the indorsers in case the paper is not paid when due, and, second, as a mere means of transferring the title of the paper indorsed. So far as an indorsement involves a new contract it is undoubtedly beyond the power of any member of a dissolved partnership to create any liability against his late partners, whether he assumes to make the indorsement in the name of the firm or not, and irrespective of the purpose for which the indorsement was made. Hence the firm cannot be held answerable on such indorsement, though the partner who made it thereby transferred the paper in payment of a firm debt: *Bryant* v. *Lord*, 19 Minn. 396; *Sanford* v. *Mickles*, 4 Johns. 224; *Fellows* v. *Wyman*, 33 N. H. 351; *Dana* v. *Conant*, 30 Vt. 246; *Nott* v. *Douming*, 6 La. 280; 26 Am. Dec. 491; *Humphries* v. *Chastain*, 5 Ga. 166; 48 Am. Dec. 247; *Whitworth* v. *Ballard*, 56 Ind. 279; *Lumberman's Bank* v. *Pratt*, 51 Me. 563; *White* v. *Tudor*, 24 Tex. 639; 76 Am. Dec. 126. We do not, however, see any objection to giving the indorsement effect as a mere transfer of title to the property: *Chappell* v. *Allen*, 38 Mo. 213; *Waite* v. *Foster*, 33 Me. 424.

Compromises and Adjustments.—Somewhat analagous to transfers made by one of the partners after the dissolution of the firm are settlements and adjustments of controversies between the firm and others by which the liability of the firm upon claims made against it is determined and extinguished, or the amount of its claim against a stranger is settled and discharged. In an early American case it was decided that after the dissolution one partner cannot bind the others by settling accounts with, or allowing credits to, customers of the firm: *Rootes* v. *Wellford*, 4 Munf. 215; 6 Am. Dec. 510. This does not accord with the weight of authority on the subject. Any compromise or adjustment made by one of the late partners, whether it be of a claim in favor of, or against, the firm, is binding on his late copartners if made in good faith, and each is answerable for his share of the liability thus fixed against the firm, and must content himself with his share of the amount thus found to be due to it: *Tutt* v. *Cloney*, 62 Mo. 116; *Moist's Admrs. Appeal*, 74 Pa. St. 166; *Bass* v. *Taylor*, 34 Miss. 342; *Cannon* v. *Wildman*, 28 Conn. 472, 493. These decisions may seem to conflict with the general rule that neither partner can, after the dissolution of the firm, enter into new contracts on its behalf or create any liability against it, but they proceed on the theory that no new liability is created, nor any new contract made; that the liability or contract already exists, and that in the course of the settlement of the partnership affairs the fixing of the amount due is a necessary transaction without which there can be no final settlement, and it is therefore a part of the remaining partnership business over which each partner has an implied authority which he may exercise to the same extent as if the partnership still existed unimpaired by any dissolution.

New Contracts.—That neither member of a dissolved partnership can in its name or as its act enter into contracts for the doing of new business is obvious, and the authorities with but few exceptions deny his power to enter into any new contract whatsoever, so as to impose any liability on his copartners, though such contract grows out of business entered upon by the firm before its dissolution, or is in settlement, extension, or renewal of obligations antedating such dissolution: *Ellicott* v. *Nichols*, 7 Gill. 85; 48

Am. Dec. 546; *Wilson* v. *Torbert*, 3 Stew. 296; 21 Am. Dec. 632; *Hurst* v. *Hill*, 8 Md. 399; 63 Am. Dec. 705; *White* v. *Tudor*, 24 Tex. 639; 76 Am. Dec. 126. "But where no question of notice intervenes the dissolution works an absolute and unqualified revocation of all power and authority in either of the partners to bind the others to any new engagement, contract, or promise. In the language of Judge Story: 'None of the partners can create any new contracts or obligations binding upon the partnership; none of them can buy, or sell, or pledge goods on account thereof; none of them can indorse or transfer the partnership securities to third persons, or in any other way make their acts the acts of the partnership. In short, none of them can do any act, or make any disposition of the partnership property or funds, in any manner inconsistent with the primary duty, now incumbent on all of them, of winding up the whole concerns of the partnership: Story on Partnership, sec. 322. As the dissolution finds the engagements of the company they must remain until liquidated and paid, unless all the partners consent to come under new engagements or otherwise change their character": *Palmer* v. *Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271. Hence a note cannot be executed by any of the late partners for an indebtedness confessedly due from the firm before its dissolution: *Smith* v. *Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Haddock* v. *Crocheron*, 32 Tex. 276; 5 Am. Rep. 244; nor, though partly executed before, can the execution be completed by him after such dissolution. A note cannot become inoperative except by its delivery. Therefore, though it was signed in the firm name, and as so signed was ready for delivery before the dissolution, such dissolution revokes the authority of either of the members to make the delivery, and no subsequent delivery can be effective without the consent of all the copartners: *Woodford* v. *Dorwin*, 3 Vt. 82; 21 Am. Dec. 573; *Robb* v. *Mudge*, 14 Gray, 534; *Gale* v. *Miller*, 54 N. Y. 536; *Glasscock* v. *Smith*, 25 Ala. 474; *Merrit* v. *Pollys*, 16 B. Mon. 355; *Woodworth* v. *Downer*, 13 Vt. 522; 37 Am. Dec. 611.

Renewals and Extensions.—The same rule applies where promissory notes or other evidence of indebtedness have been given during the existence of the partnership. They cannot, after its dissolution, be renewed or extended by either party without express authority from the others, for every new obligation must necessarily be of different purport from the old evidence of indebtedness, and if either of the partners had authority to create a new, to take the place of the old, indebtedness he could thereby prolong the liability of the firm for an indefinite period, and thus hinder, rather than promote, the final closing of its business and the distribution of its assets: *Gaillott* v. *Planters' &c. Bank*, 1 McMull. 209; 36 Am. Dec. 256; *Perrin* v. *Keene*, 19 Me. 355; 36 Am. Dec. 759; *Haddock* v. *Crocheron*, 32 Tex. 276; 5 Am. Rep. 244; *White* v. *Tudor*, 24 Tex. 639; 76 Am. Dec. 126; *Parker* v. *Cousins*, 2 Gratt. 272; 44 Am. Dec. 388; *Hurst* v. *Hill*, 8 Md. 399; 63 Am. Dec. 705.

Acknowledgments and New Promises in Connection with the Statute of Limitations. If it be true, as the authorities cited in the last paragraph affirm, that neither member of a dissolved partnership has the power to renew a promissory note or other evidence of indebtedness so as to bind his copartners, then, upon the same principle, every acknowledgment, new promise, or partial payment, made by one of the late copartners ought to be equally unavailing to prevent the running of the statute of limitations, or to revive a debt already barred thereby, for surely to give such an effect to an acknowledgment or promise made by one of the partners is to permit him to renew the firm indebtedness, and what he cannot do directly he

ought not to be able to accomplish indirectly. "Now, the doctrine seems well settled by authority, that an acknowledgment is to be considered, not as a continuation of the old promise, but as evidence of a new promise; and therefore, it is alone this new promise which takes the debt out of the statute. This new promise is a new contract, nothing more, nothing less; and it is a contract to pay a pre-existing debt, which of itself does not bind the party, because by force of the law it was extinguished. Hence, is not the acknowledgment, in essence and in law, the creation of a new contract, which gives the creditor a new cause of action, and not simply the enforcement of the old one? It, therefore, seems clear, both upon principle and authority, that after the relation of partners has ceased to exist one of the partners cannot, upon the ground of mutual agency, bind the others by such contract": *Mayberry* v. *Willoughby*, 5 Neb. 368; 25 Am. Rep. 491. These views are supported by a slight preponderance of authority and forbid both the renewal of a debt after it is completely barred by the statute and the continuation of the time within which the statute will operate where the new promise, acknowledgment, or partial payment takes place before the bar of the statute has already become final: *Hackley* v. *Patrick*, 3 Johns. 536; *Tate* v. *Clements*, 16 Fla. 339; 26 Am. Rep. 709; *Mayberry* v. *Willoughby*, 5 Neb. 368; 25 Am. Rep. 491; *Bell* v. *Morrison*, 1 Pet. 351; *Shoemaker* v. *Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Bush* v. *Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; *Levy* v. *Cadet*, 17 Serg. & R. 126; 17 Am. Dec. 650; *Ellicott* v. *Nichols*, 7 Gill. 85; 48 Am. Dec. 546; *Van Keuren* v. *Parmelee*, 2 N. Y. 526; 51 Am. Dec. 322; *Muse* v. *Donelson*, 2 Humph. 166; 36 Am. Dec. 309. The theory apparently adopted in England, however, is that every joint debtor, whether the debtors are copartners or not, is for certain purposes the agent of his codebtors, among which is included the implied and irrevocable authority to make partial payments, acknowledgments, and new promises upon and respecting the joint debt, having the same effect as against his codebtors as against himself, both in prolonging the statute of limitations and in reviving obligations wholly barred thereby. The authorities applying this rule to the members of dissolved corporations are scarcely inferior in weight and are perhaps superior in number to those supporting the opposite doctrine: *Merritt* v. *Day*, 9 Vroom. 32; 20 Am. Rep. 362; *Mills* v. *Hyde*, 19 Vt. 59; 46 Am. Dec. 177; *Whitcomb* v. *Whiting*, 2 Doug. 651; *Wood* v. *Braddick*, 1 Taunt. 104; *Cady* v. *Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Vinal* v. *Burrill*, 16 Pick. 401; *Wills* v. *Hill*, 2 Dev. & B. Eq. 231; 31 Am. Dec. 412; *Greenleaf* v. *Quincy*, 12 Me. 11; 28 Am. Dec. 145; *McIntire* v. *Oliver*, 2 Hawks, 209; 11 Am. Dec. 760; *Austin* v. *Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Beardsley* v. *Hall*, 36 Conn. 270; 4 Am. Rep. 74; *Wheelock* v. *Doolittle*, 18 Vt. 400; 46 Am. Dec. 163; *McClurg* v. *Howard*, 45 Mo. 365; 100 Am. Dec. 378.

The Admissions of a Partner after the Dissolution of a partnership stand on exactly the same footing as his acknowledgments or new promises respecting debts against which the statute of limitations is interposed as a defense by his copartners, and the same difference of judicial opinion exists as to the effect to be accorded to them. As to transactions arising after the dissolution, we believe that none of the decisions maintain that the late copartners are authorized to act as agents of one another: *Taylor* v. *Hillyer*, 3 Blackf. 433; 26 Am. Dec. 430; *Willis* v. *Hill*, 2 Dev. & B. 231; 31 Am. Dec. 412. But where the transaction has taken place during the existence of the partnership so as to create a liability against it, the English, and a large number of the American, decisions assert that though the partnership is subse-

quently dissolved, each of the late copartners so far represents his fellows that any declaration made by him is competent but not conclusive evidence against them: *Wood* v. *Braddick*, 1 Taunt, 104; *Cady* v. *Shepherd*, 11 Pick. 400; 22 Am. Dec. 379. Hence the following admissions made after the dissolution of a partnership by one member thereof have been received in evidence against the others: An admission that though a receipt had been given showing the payment of a partnership debt, it was given by mistake, and the debt remained wholly or partly unpaid: *Bridge* v. *Gray*, 14 Pick. 55; 25 Am. Dec. 358; that one of the late partners adjusted the accounts between the firm and one of its creditors, and admitted a certain sum to be due: *Feigley* v. *Whitaker*, 22 Ohio St. 606; 10 Am. Rep. 778; *Buxton* v. *Edwards*, 134 Mass. 567; *Ide* v. *Ingraham*, 5 Gray, 106; that a member of the late firm had received property in payment of the debt due to it: *Kirk* v. *Hiatt*, 2 Ind. 322; and generally any admission or statement connected with a partnership liability respecting a fact alleged to have occurred during the existence of the firm: *Munson* v. *Wickwire*, 21 Conn. 513, 518; *Parker* v. *Merrill*, 6 Me. 41; *Foster* v. *Fifield*, 29 Me. 136; *Hinkley* v. *Galligan*, 34 Me. 101; *Gay* v. *Bowen*, 8 Met. 100; *Mann* v. *Locke*, 11 N. H. 246; *Pennoyer* v. *David*, 8 Mich. 407; *Pierce* v. *Wood*, 23 N. H. 519; *Rich* v. *Flanders*, 39 N. H. 304; *McElroy* v. *Ludlum*, 32 N. J. Eq. 828; *Chardon* v. *Oliphant*, 3 Brev. 186; 6 Am. Dec. 572; *Woodworth* v. *Downer*, 13 Vt. 522; 37 Am. Dec. 611. On the other hand, decisions still more numerous deny the authority of any member of a dissolved firm to represent his copartners after its dissolution for the purpose of making any declaration or admission to be operative against them, or any of them except himself. As to statements made by a late partner in adjusting accounts, we have seen that he has authority, after the dissolution, to make such adjustments, and therefore his statements or admissions that a particular sum remained due to or from the firm may be admissible against it and its late members as part of the *res gestæ*. When, however, an admission of a partner made after the dissolution is not part of some act which he is then authorized to do, and therefore part of the *res gestæ*, the majority of the American decisions deny the admissibility of such admission for any purpose except as evidence against the person making it: *Brady* v. *Hill*, 1 Mo. 315; 13 Am. Dec. 503; *Baker* v. *Stackpoole*, 9 Cow. 420; 18 Am. Dec. 508; *Hamilton* v. *Summers*, 13 B. Mon. 11; 54 Am. Dec. 509; *Barringer* v. *Sneed*, 3 Stew. 201; 20 Am. Dec. 74; *Downelot* v. *Rawlings*, 58 Mo. 75; *Walden* v. *Sherburne*, 15 Johns. 409; *Nichols* v. *White*, 85 N. Y. 531; *Pringle* v. *Leverich*, 97 N. Y. 181; 49 Am. Rep. 522; *Hogy* v. *Orgill*, 34 Pa. St. 344; *Bispham* v. *Patterson*, 2 McLean, 87; *Thompson* v. *Bowman*, 6 Wall. 316; *Burns* v. *McKenzie*, 23 Cal. 101; *Curry* v. *White*, 51 Cal. 530; *Miller* v. *Neimerick*, 19 Ill. 172; *Winslow* v. *Newlan*, 45 Ill. 145; *Yandes* v. *Lefavour*, 2 Blackf. 371; *Spears* v. *Toland*, 1 A. K. Marsh. 203; 10 Am. Dec. 722; *Craig* v. *Alverson*, 6 J. J. Marsh. 609; *Bentley* v. *White*, 3 B. Mon. 263, 266; 38 Am. Dec. 186; *Daniel* v. *Nelson*, 10 B. Mon. 316; *Conery* v. *Hayes*, 19 La. Ann. 325; *Maxey* v. *Strong*, 53 Miss. 280; *Owings* v. *Low*, 5 Gill. & J. 134; *Brady*, v. *Hill*, 1 Mo. 315; 13 Am. Dec. 503; *Little* v. *Ferguson*, 11 Mo. 598; *Pope* v. *Risley*, 23 Mo. 185; *American I. M. Co.* v. *Evans*, 27 Mo. 552; *Flowers* v. *Helm*, 29 Mo. 324.

The Borrowing of Money, whether to meet pre-existing obligations or not, is necessarily a new contract, and therefore neither member of a dissolved partnership can by borrowing money bind his copartners, unless this constitutes an exception to the general rule that after the dissolution no new contracts can be entered into without the consent of all the members

of the late firm. Doubtless there may be cases in which partnership property and business may be left in charge of one or more members of a dissolved firm for such purposes and under such circumstances that his partners must be assumed to have intended him to raise moneys for its preservation by any lawful method, and other cases in which moneys raised by loans have been employed for the benefit of the late partnership so openly that all the partners must be deemed to have known of and ratified the means by which it was procured, though they consisted of new contracts. Hence, the opinion was expressed in a case in which the question was not necessarily involved that a partner, after the dissolution of the firm, borrowing money and applying it to the payment of partnership obligations, thereby incurred a liability enforceable against all the members of the firm: *Estate of Davis*, 5 Whart. 530; 34 Am. Dec. 574. We apprehend, however, that the general power of a partner of a dissolved partnership to borrow money even to meet obligations of the firm must be denied in all cases except those in which the character of the business which the other copartners have left to the liquidating partner to carry on is such that they must have anticipated that he could not manage it as they intended he should without using the credit of the members of the firm, and, therefore, where they must by fair implication be deemed to have invested him with the power to borrow if necessary.

As to Business which Remains Uncompleted after the Dissolution of the Firm and which it has the right to complete or which the other contracting parties have the right to have completed notwithstanding such dissolution, the partnership must be regarded as continuing and each partner as having the same authority as before to represent his firm in all acts necessary to complete the contract: *Page* v. *Wolcott*, 15 Gray, 536; *Holmes* v. *Shands*, 27 Miss. 40; *Rust* v. *Chisolm*, 57 Md. 376; *Western Stage Co.* v. *Walker*, 2 Iowa, 504; 65 Am. Dec. 789. He may therefore act for the firm and do as its act whatever is essential in the matter, and the other party to the contract may deal with him alone for the purpose of demanding, requiring, or performing any act due from or to the firm.

If a Tender or Demand Must be Made or a Notice Given to create and keep alive a liability against the firm it may be made or given to either of its members after the disolution as well as before. This rule applies to the demand required to be made and the notice to be given to charge the firm as indorsers of negotiable paper: *Brown* v. *Turner*, 15 Ala. 832; *Crowley* v. *Barry*, 4 Gill. 194; *Fourth N. B.* v. *Heuschen*, 52 Mo. 207; *Gates* v. *Beecher*, 60 N. Y. 518; 19 Am. Rep. 207; *Hart* v. *Long*, 1 Rob. (La.) 83.

Waivers.—If the holder of such paper after failing to take any steps to charge the firm or its members as indorsers releases them from all liability thereon, doubtless neither member can subsequently revive such liability by any waiver or agreement to which the others did not assent, for this would be to make a new contract. On the other hand, at any time, while the right to charge the firm as indorsers continues, either partner may make any waiver which it would be competent for him to make if the partnership had not been dissolved. He may, therefore, on behalf of the firm or all of its members, as well as for himself, waive demand of payment and notice of nonpayment: *Darling* v. *March*, 22 Me. 184; *Star W. Co.* v. *Sweezy*, 52 Iowa, 394; *Seldner* v. *Mt. Jackson, N. B.*, 66 Md. 488; 59 Am. Rep. 190. So if a firm is entitled to the delivery of goods in pursuance of a contract made before its dissolution, such delivery may be made to either partner, and, if he so request, may be at a place different from that designated in

the contract: *Cady* v. *Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Hubbard* v. *Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Kenney* v. *Altwater*, 77 Pa. St. 34.

Collections—If moneys become due, either partner has a right to collect and receipt for them: *Bradley* v. *Camp*, Kirby, 77; 1 Am. Dec. 13; *Nickels* v. *Mooring*, 16 Fla. 76; *Tyng* v. *Thayer*, 8 Allen, 391; *Napier* v. *McLeod*, 9 Wend. 120; *Gillilan* v. *Sun M. I. Co.*, 41 N. Y. 376; *Cannon* v. *Wildman*, 28 Conn. 472; and of this right he cannot be deprived by any notice from the others to the creditor warning the latter not to make such payment: *Granger* v. *McGilera*, 24 Ill. 152.

What are the Rights of the Partners after the Dissolution of the Firm may, in a great degree, be inferred from what we have said concerning their powers, for what either has the power to do as the representative of the late firm he must be conceded the right to perform. Hence, each has an equal right to the possession of its assets: *Gray* v. *Green*, 142 N. Y. 316, *post*, p. 596, and each may do whatever acts are necessary to complete the business of the partnership upon which it had entered before its dissolution or which, though it had not entered thereupon, it had bound itself to do by agreement continuing in force notwithstanding the termination of the partnership. Furthermore, as each partner is entitled to have the business closed by the collection of the assets, and the discharge of the obligations, and a division of the residue, each may take steps looking to that end and exercise the powers vested in him to dispose of and preserve the property of the firm and to pay its obligations. He has the right, after the partnership liabilities are paid, to have paid him from the remaining assets of the firm any moneys due to him for advances made or otherwise, and, to aid in the enforcement of this right, is entitled to the benefit of a partner's lien: *Roberts* v. *McCarty*, 9 Ind. 16; 68 Am. Dec. 604; *Bardwell* v. *Perry*, 19 Vt. 292; 47 Am. Dec. 687; *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539; unless he has sold his interest in the partnership to his late partners or to a stranger: *Smith* v. *Edwards*, 7 Humph. 106; 46 Am. Dec. 71; *Miller* v. *Estill*, 5 Ohio St. 508; 67 Am. Dec. 305; *Upson* v. *Arnold*, 19 Ga. 190; 63 Am. Dec. 302; *Arnold* v. *Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712. The relations between him and his late partners are still relations of trust and confidence so far as the firm business and assets are involved precluding them from occupying a position of hostility to him or of acquiring for themselves an advantage to which the firm is entitled. A familiar instance of the application of this rule exists where the partnership are tenants of property under a lease entitling them to the privilege of renewal, in which case neither party can, though the firm has been dissolved, obtain a renewal of such lease for his personal benefit: *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539; *Speiss* v. *Rosswog*, 96 N. Y. 651.

After the dissolution of the firm each of the partners has the right to enter into the same or any other business on his own account. As to the trademarks, and what is commonly called "the good-will of the firm," they are, beyond question, firm property, and each of the partners is entitled to have them treated as such, and even by the appointment of a receiver to continue the business for a short time to prevent their depreciation in value, and to enable a sale thereof to be made, and the proceeds added to the assets for distribution among the several partners: *Martin* v. *Van Schaick*, 4 Paige, 479; *Sheppard* v. *Boggs*, 9 Neb. 217; *Williams* v. *Wilson*, 4 Sand. Ch. 379, though this rule is probably inapplicable to those partnerships of a personal nature in which the business consists of the personal services of the several members in some capacity in which they have,

or are supposed to have, special skill: *Rice* v. *Angell*, 73 Tex. 350. If the good-will is sold and the proceeds added to the assets of the firm, the partners will be compelled to respect the rights of the purchaser, and not allowed to solicit his customers in such a way as to leave the impression that they are, or that either is, carrying on the business at the old stand, or as the successor of the late firm: *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215; 52 Am. Rep. 811; *Shaver* v. *Shaver*, 54 Iowa, 208; 37 Am. Rep. 194. Subject to these limitations, each member has as fully and completely the right to engage in any kind of business as if he had never been a member of the partnership, and this rule is equally applicable, whether the good-will has been sold by order of court or one of the members of the firm has expressly or impliedly transferred it to the others, in connection with the partnership property or otherwise: *Williams* v. *Farrand*, 88 Mich. 473; *Cottrell* v. *Babcock P. P. M. Co.*, 54 Conn. 138; *Washburn* v. *Dosch*, 68 Wis. 439; 60 Am. Rep. 873; *Pearson* v. *Pearson*, L. R. 27 Ch. Div. 145; *Vernon* v. *Hallon*, L. R. 34 Ch. Div. 752; *Fish Bros. W. Co.* v. *La Belle W. W.*, 82 Wis. 546; 33 Am. St. Rep. 72, 78; *Beryamini* v. *Bastian*, 35 La. Ann. 60; 48 Am. Rep. 216, and note.

If property of the firm is in the possession of one of the members of the partnership he has the power to take such measures as are necessary for its preservation, and to charge the partnership for the expenses reasonably incurred thereby: *Conrad* v. *Buck*, 21 W. Va. 396, 413. If the business is conducted with the consent of the other members, the one in charge thereof may employ necessary assistants, and for all expenses in carrying on the business, and caring for the assets, he is entitled to charge the firm account, and to be compensated on the settlement of its affairs: *Tyng* v. *Thayer*, 8 Allen, 391; *Holloway* v. *Turner*, 61 Md. 217; *Gyger's Appeal*, 62 Pa. St. 73; *Mellersh* v. *Keen*, 27 Beav. 236; *Airey* v. *Borham*, 29 Beav. 620, and if he has firm moneys in his hand he may use them in the payment of such expenses and in the discharge of any existing firm obligation: *Rice* v. *McMartin*, 39 Conn. 573; *Schalck* v. *Harmon*, 6 Minn. 265. The title of the partnership is after the dissolution for most purposes to be regarded as held by a tenancy in common, and the rights of the several partners are to a great extent those of cotenants. Therefore neither has the right to be reimbursed for outlays thereon other than those for its preservation and perhaps for necessary repairs, and neither has the right at the expense of the firm to make improvements or to rebuild property which has been destroyed by fire or otherwise; *Stebbins* v. *Willard*, 53 Vt. 665; Freeman on Cotenancy and Partnership, secs. 261, 262.

Compensation.—Each of the partners, in the absence of contract stipulations to the contrary, is bound to give his services to the business of the firm, and this remains true after its dissolution so far as is necessary to the winding up of its affairs and preserving its property, and for all services rendered by either partner in what might fairly, on the formation of the partnership, have been anticipated as probably necessary to the closing of its business, he cannot recover, though such services may have been far in excess of any rendered by his copartners, or he may have transacted the whole business without any aid from them whatsoever: *Cothran* v. *Knox*, 13 S. C. 496; *McMichael* v. *Raoul*, 14 La. Ann. 305; *Bennett* v. *Russell*, 34 Mo. 524; *Courcen* v. *Hamlin*, 2 Duer, 513; *Dunlap* v. *Watson*, 124 Mass. 305; *Little* v. *Caldwell*, 101 Cal. 560; 40 Am. St. Rep. 89; *Denver* v. *Roane*, 99 U. S. 358; *Beatty* v. *Wray*, 19 Pa. St. 516; 57 Am. Dec. 677; *Brown* v. *McFarland*, 41 Pa. St. 129; 80 Am. Dec. 598; *Contra*, *Bradley* v. *Chamberlain*, 16 Vt. 613. The business

may be of such a character that, on the dissolution of the partnership, it cannot be closed at once to advantage, and it is therefore continued with the expressed or implied assent of all the partners, and by a like assent is committed to the care and management of some only of them. In such cases the partner or partners in possession of the assets and continuing the business will in equity be regarded as in some respects occupying the position of trustees and as such entitled to be compensated for services in the management of the trust property, and whether or not any personal claim can be maintained therefor against the other partners, the value of the services may at least be deducted before accounting for profits realized from the business: *Mellersh* v. *Keen*, 27 Beav. 236; *Airey* v. *Borham*, 29 Beav. 620; *Newell* v. *Humphrey*, 37 Vt. 265; *Schenkl* v. *Dana*, 118 Mass. 236.

In the Profits Realized after the Dissolution each of the partners has the same interest as before, though they may have resulted from the labor of one copartner alone: *Osment* v. *McElrath*, 68 Cal. 466; 58 Am. Rep. 17. Either partner is at liberty after the dissolution to enter into the same business, whether in competition with his former copartners or not: *Porter* v. *Gorman*, 65 Ga. 11; *Hoxie* v. *Chaney*, 143 Mass. 592; 58 Am. Rep. 149, and, unless restrained by some transfer or agreement, is equally with them, or any of them, entitled to use trademarks that were used by the firm before its dissolution: *Hazard* v. *Caswell*, 93 N. Y. 259; 45 Am. Rep. 198; *Caswell* v. *Hazard*, 121 N. Y. 484; 18 Am. St. Rep. 833; *Hall* v. *Barrows*, 4 De Gex J. & S. 159; *Robbins* v. *Fuller*, 24 N. Y. 570; *Fish Bros. W. Co.* v. *La Belle W. W.*, 82 Wis. 546; 33 Am. St. Rep. 72.

A Partner Whose Interest in the Firm Property Has Been Transferred to Another, whether by his voluntary act or by proceedings against him in bankruptcy and the like, is no longer a partner for any purpose except that his liability for the partnership indebtedness remains as before. He therefore does not have either the powers or rights we have described as belonging to a partner after the dissolution of the firm. Neither does his transferee take his place as a partner unless permitted to do so by the agreement of the other copartners. Therefore the powers and rights of the members of the late partnership vest wholly in those who retain their interest therein, subject to their duty to equitably administer their *quasi* trust, and to account to the assignees of their former partner, upon the settlement of the business, for his share of the residue remaining for distribution: *Miller* v. *Brigham*, 50 Cal. 615; *Reece* v. *Hoyt*, 4 Ind. 169; *Choppin* v. *Wilson*, 27 La. Ann. 444; *Hamill* v. *Hamill*, 27 Md. 679; *Renton* v. *Chaplain*, 9 N. J. Eq. 62; *Ballard* v. *Callison*, 4 W. Va. 326; *Saloy* v. *Albrecht*, 17 La. Ann. 75. Therefore, in the event of one of the members selling his interest in the partnership or being declared a bankrupt or insolvent, the others become entitled to the exclusive possession of its property and to conduct the proceeding for closing its business: *Fox* v. *Hanbury*, Cowp. 445; *Amsinck* v. *Bean*, 22 Wall. 395; *Talcott* v. *Dudley*, 5 Ill. 427; *Hanson* v. *Paige*, 3 Gray, 239, 242; *Ogden* v. *Arnot*, 29 Hun, 146; *Renton* v. *Chaplain*, 9 N. J. Eq. 62; *Schalck* v. *Harmon*, 6 Minn. 265, 270; and they alone may sell its effects: *Freeland* v. *Stansfield*, 2 Sm. & G. 479; *Fox* v. *Hanbury*, Cowp. 445; *Ogden* v. *Arnot*, 29 Hun, 146; *Harvey* v. *Crickett*, 5 Maule & S. 336; *Smith* v. *Oriell*, 1 East. 368; *Woodbridge* v. *Swan*, 4 Barn. & Adol. 633; and collect its credits or otherwise enforce obligations due to it: *Harvey* v. *Crickett*, 5 Maule & S. 336; *Freeland* v. *Stansfield*, 2 Sm. & G. 479; *Ogden* v. *Arnot*, 29 Hun, 146.

The Liquidating Partner is often spoken of in decisions respecting the business and affairs of a dissolved partnership. This term is employed

merely to signify that one rather than all of the partners has attended to the business arising after the dissolution. By agreement between him and his copartners they may, perhaps, abdicate to him the powers which they otherwise possess to the same extent as he, and thus, as to all persons having notice, confer upon him exclusive authority to settle the business and dispose of the property of the firm. Even then he does not possess any power he did not have before, and he cannot bind the partnership in any manner or for any purpose not before within the power of either partner unless he has been given express authority to do for and as the act of his copartners something which neither had any power or right to do merely in his own capacity as partner, or such authority, though not directly expressed, must be implied from the authority conferred or from the course of business which they authorized him to pursue: *Mauney* v. *Coit*, 80 N. C. 300; 30 Am. Rep. 80; *Conrad* v. *Buck*, 21 W. Va. 396; *Parker* v. *Cousins*, 2 Gratt. 372; 44 Am. Dec. 388; *Palmer* v. *Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271; *Perrin* v. *Keene*, 19 Me. 355; 36 Am. Dec. 759; *Smith* v. *Shelden*, 35 Mich. 42; 24 Am. Rep. 529; *Maxey* v. *Strong*, 53 Miss. 280; *Houser* v. *Irvine*, 3 Watts & S. 345; 38 Am. Dec. 768. He is merely the agent of the late firm to collect and adjust its debts, to turn its assets into money, to discharge its outstanding liabilities, and to pay over to the other partners their share of the surplus: *Gilmore* v. *Ham*, 142 N. Y. 1; *ante*, p. 554; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417. As such agent he is not authorized to enter into new contracts on behalf of the firm or its members: *Palmer* v. *Dodge*, 4 Ohio St. 21, 62 Am. Dec. 271, except in Pennsylvania, where the authority of a partner intrusted with the management of the business of a dissolved firm extends to the borrowing of moneys to be used for the payment of its debts and also to executing promissory notes and other evidence of pre-existing indebtedness: *Estate of Davis*, 5 Whart. 530; 34 Am. Dec. 574; *Fulton* v. *Central Bank*, 92 Pa. St. 112; *Earon* v. *Mackey*, 106 Pa. St. 452; *Robinson* v. *Taylor*, 4 Pa. St. 242; *Brown* v. *Clark*, 14 Pa. St. 469. The liquidating partner must perform his duties with reasonable diligence: *Evans* v. *Evans*, 9 Paige, 180, and failing to do so becomes liable to a suit for an accounting and to compel the final winding up of the partnership business, as we shall hereafter see in considering the operation of laches and the statute of limitations as defenses to a suit against a late copartner for an accounting.

Liabilities, Agreements Respecting.—After the dissolution of the partnership each partner remains liable for its indebtedness to the same extent as before. He may make agreements with his copartners by which they assume such indebtedness and covenant to save him harmless therefrom, and for any breach of these agreements he may recover from them the damages sustained thereby: *Hunt* v. *Rogers*, 7 Allen, 469; 83 Am. Dec. 704. The agreement cannot, however, affect creditors of the partnership who did not assent thereto to the extent of releasing their claims against the partner in whose favor it was made, nor of compelling them to first resort to the other partners in proceedings to enforce the liability: *Rawson* v. *Taylor*, 30 Ohio St. 389; 27 Am. Rep. 464; *Winston* v. *Taylor*, 28 Mo. 82; 75 Am. Dec. 112; *Eagle Mfg. Co.* v. *Jennings*, 29 Kan. 657; 44 Am. Rep. 668. If they have notice of the agreement, it may, however, entitle the partner in whose favor it is to be treated as a surety of the others to the extent of releasing him from liability if the creditor surrenders securities in his hands, or extends the time for the payment of the debt, or does any other prejudicial act on account of which a surety might be released from liability: *Colyrove* v. *Tall-*

man, 67 N. Y. 95; 23 Am. Rep. 90; *Smith* v. *Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Leithauser* v. *Baumeister*, 47 Minn. 151; 28 Am. St. Rep. 336. If the partner in whose favor the agreement has been made has sold his interest in the firm to his co-partners or to others he has thereby discharged his partnership lien and has no other remedy against the partners who have failed to keep their agreement than if his claim against them did not grow out of any partnership transaction: *Smith* v. *Edwards*, 7 Humph. 106; 46 Am. Dec. 71; *Miller* v. *Estill*, 5 Ohio St. 508; 67 Am. Dec. 305; *Upson* v. *Arnold*, 19 Ga. 190; 63 Am. Dec. 302; *Baker's Appeal*, 21 Pa. St. 76; 59 Am. Rep. 752.

Liability, Notice to Terminate.—The liability of a partner may extend beyond the indebtedness existing at the dissolution and include indebtedness subsequently contracted in favor of persons relying on the partnership liability, and who did not have any notice of its dissolution. Those who had dealt with the firm before dissolution are entitled to hold all the partners liable for debts contracted afterwards in good faith in the belief that the firm still continued and in reliance upon its assets and the personal responsibility of its members. As to such customers actual notice is required to exempt from liability any member of the firm though he has retired therefrom: *Burgan* v. *Lyell*, 2 Mich. 102; 55 Am. Dec 53; *Ellison* v. *Sexton*, 105 N. C. 356; 18 Am. St. Rep. 907; *Bradley* v. *Camp*, Kirby, 77; 1 Am. Dec. 13; *Amidown* v. *Osgood*, 24 Vt. 278; 58 Am. Dec. 171. The fact that notice was mailed to such customer, *Austin* v. *Holland*, 69 N. Y. 571, 25 Am. Rep. 246, or was published in a newspaper of general circulation, *Rose* v. *Coffield*, 53 Md. 18, 36 Am. Rep. 389, and such newspaper mailed to a creditor with a red line drawn about the notice for the purpose of attracting attention to it, *Haynes* v. *Carter*, 12 Heisk. 7, 27 Am. Rep. 747, or that the dissolution had attained general notoriety, cannot defeat such customer's claim to hold all the members of the firm answerable if it appears that he did not have actual notice of the dissolution: *Pitcher* v. *Barrows*, 17 Pick. 361; 28 Am. Dec. 306. If the original indebtedness arose during the existence of the firm, a promissory note executed therefor by one of the partners after the dissolution, but without notice on the part of the payee, is binding upon the firm, and must be treated as a partnership indebtedness to the same extent as if such note had been executed before the dissolution: *Clement* v. *Clement*, 69 Wis. 599; 2 Am. St. Rep. 760; *Graves* v. *Merry*, 6 Cow. 701; 16 Am. Dec. 471. Persons who have not dealt with the firm before its dissolution are not entitled to actual notice thereof and cannot hold a retiring member answerable if notice of the dissolution has been given by publication in a newspaper: *Graves* v. *Merry*, 6 Cow. 701; 16 Am. Dec. 471; *Watkinson* v. *Bank of Pennsylvania*, 4 Wheat. 482; 34 Am. Dec. 521; *Nott* v. *Douming*, 6 La. 680; 26 Am. Dec. 491; *Prentiss* v. *Sinclair*, 5 Vt. 149; 26 Am. Dec. 288; *Johnson* v. *Totten*, 3 Cal. 343; 58 Am. Dec. 412; *Scheiffelin* v. *Stevens*, 1 Winst. 106; 34 Am. Dec. 355; *Ellison* v. *Sexton*, 105 N. C. 356; 18 Am. St. Rep. 907. If the dissolution of the firm is the result of a proceeding in bankruptcy against one of its members, this being a "public and notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given": *Eustis* v. *Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327.

The Remedies of the Partners against Third Persons after the dissolution of the firm are the same as before. For the purpose of enforcing obligations due to the partnership, collecting its assets, recovering partnership

property, and the like, the partnership may be regarded as continuing, and suits and actions prosecuted as if no dissolution had taken place, except that when the dissolution has resulted from the death or bankruptcy of a partner or from his transferring his interest in the firm, the right of action devolves upon the partners who survive or continue to hold their interest in the partnership.

The Remedy which one Partner has by Suit or Action against Another also remains after the dissolution as before with the additional right of action for the closing of the partnership and for an accounting. If a balance has been struck and a sum ascertained to be due from one to the other, an action of assumpsit may be sustained therefor; note to 12 Am. Dec. 649 to 651; *Dana* v. *Gill*, 5 J. J. Marsh. 242; 20 Am. Dec. 255; *Fanning* v. *Chadwick*, 3 Pick. 420; 15 Am. Dec. 223. Otherwise no action can be maintained on account of any partnership transaction: *Course* v. *Prince*, 1 Mill, 416; 12 Am. Dec. 649, and note; *Newby* v. *Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503; *Bruce* v. *Hastings*, 41 Vt. 380; 98 Am. Dec. 592, except for an accounting in which may be included the disposition of the partnership assets and the distribution among the partners of the surplus proceeds. The appointment of a receiver may be procured when necessary to preserve the property from loss or when it is shown to be otherwise necessary and for the best interests of the partnership: *Allen* v. *Hawley*, 6 Fla. 142; 63 Am. Dec. 198; note to *Cortelyou* v. *Hathaway*, 64 Am. Dec. 486–488; *Law* v. *Ford*, 2 Paige, 310; *Marten* v. *Van Schaick*, 4 Paige, 479.

Statutes of Limitations in Suits for Accounting.—The time after which it is too late to prosecute with success a suit against a partner for an accounting or to compel him to discharge a liability existing in favor of his late partner and growing out of their partnership relations is difficult to determine in the light of the conflicting decisions. Perhaps the subject is treated more reasonably in the principal case than elsewhere. In the first place, as the suit is in equity, there may be no statute of limitations applicable to it. Even when this is the case, it is, like other equitable proceedings, subject to the rule, that to obtain relief in chancery the suitor must exercise reasonable diligence and may be denied redress solely on the ground of his laches, though no statute of limitation applies, or the statute applicable to such a proceeding does not for some reason include the one before the court; *Foster* v. *Rison*, 17 Gratt. 321; *Groenendyke* v. *Coffeen*, 109 Ill. 325; *Hoyt* v. *Sprague*, 103 U. S. 616; *Tracy* v. *Walker*, 1 Flip. 41, 3 West. L. Month. 574; *Gover* v. *Hall*, 3 Har. & J. 43; *Hall* v. *Clagett*, 48 Md. 223, 240; *Arnett* v. *Finney*, 41 N. J. Eq. 147; *Codman* v. *Rogers*, 10 Pick. 112; *Taylor* v. *Morrison*, 7 Dana, 241; *Pierce* v. *McClellan*, 93 Ill. 245; *Knox* v. *Gye*, L. R. 5 H. L. 656; *Chouteau* v. *Barlow*, 110 U. S. 238; *Eakin* v. *Knox*, 6 S. C. 14; *Rencher* v. *Anderson*, 95 N. C. 208; *Bolton* v. *Dickens*, 4 Lea, 569; *McElwin* v. *Gillespie*, 3 Lea, 204, 206; *Miller* v. *Harris*, 9 Baxt. 101; *Bell* v. *Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791. If, however, there is a statute of limitations applicable to suits at law for an accounting it will generally be adopted by courts of equity in proceedings before them for a like purpose: *Godden* v. *Kimmell*, 99 U. S. 201; *Barber* v. *Barber*, 18 Ves. 286; *Brewer* v. *Browne*, 68 Ala. 210; *Pierce* v. *McClellan*, 93 Ill. 245; *McCament* v. *Gray*, 6 Blackf. 233; *Johnson* v. *Ames*, 11 Pick. 173; *Arnett* v. *Finney*, 41 N. J. Eq. 147; *McKelvy's Appeal*, 72 Pa. St. 409. The difficulty is in determining when a cause of action is perfect so that the complaining partner may be regarded as in default for not bringing some suit, for before that time it is obvious that the period allowed by the statute has not begun to run.

The possession of a late partner, like that of any other cotenant, is presumed not to be in hostility to the title or rights of his co-owners, and they have no cause of complaint until it becomes so in fact and they have knowledge thereof, or until his conduct while in possession is such that his co-owners can be ignorant of his hostile claim only by failing to give their business and property their reasonable attention: *Coudrey* v. *Gilliam*, 60 Mo. 86; *Patterson* v. *Lilly*, 90 N. C. 82; *Carroll* v. *Evans*, 27 Tex. 262; *Near* v. *Lowe*, 49 Mich. 482; *Montgomery* v. *Montgomery*, Rich. Eq. Cas. 64; *Boggs* v. *Johnson*, 26 W. Va. 821; *Gray* v. *Green*, 142 N. Y. 316; post, p. 596.

Certainly the right of action for an accounting cannot exist, nor can the statute of limitations against a suit therefor begin to run until the partnership has been dissolved: *Chandler* v. *Chandler*, 4 Pick. 78; *Askew* v. *Springer*, 111 Ill. 662; *Allen* v. *Woonsocket Co.*, 11 R. I. 288; *Harris* v. *Hillegass*, 54 Cal. 463, and there are decisions affirming that it does not begin to run at that time: *Spear* v. *Newell*, 13 Vt. 288; *McKelvy's Appeal*, 72 Pa. St. 409. This, upon principle, cannot be true, unless the affairs of the partnership are in such a condition that an accounting could then be had and the moneys or property due to each partner ascertained. Hence the decisions postponing the cause of action and the consequent commencement of the running of the statute, to the time when the partnership business is all adjusted and ready to be closed: *Hendy* v. *March*, 75 Cal. 567; *Hammond* v. *Hammond*, 20 Ga. 560; *Prentice* v. *Elliott*, 72 Ga. 156; *Riddle* v. *Whitehill*, 135 U. S. 621. Other decisions make a demand for an accounting or for a settlement of the partnership business a prerequisite to a suit for an accounting, and date the commencement of the operation of the statute from such demand: *Richards* v. *Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Patterson* v. *Lilly*, 90 N. C. 82; while others affirm that such demand is not necessary, if the liquidating partner, or the person against whom relief is sought, has had a reasonable time within which to account or to close up the business: *Codman* v. *Rogers*, 10 Pick. 112; *Clements* v. *Lee*, 8 Tex. 374; *Lawrence* v. *Rokes*, 61 Me. 38; *McClung* v. *Capehart*, 24 Minn. 17. The existence of debts due to or from the firm has in other cases been held to postpone the time for an accounting, and, therefore, to prevent the running of the statute of limitations: *Jordan* v. *Miller*, 75 Va. 442; *McClung* v. *Capehart*, 24 Minn. 17; *Foster* v. *Rison*, 17 Gratt. 321; *Hammond* v. *Hammond*, 20 Ga. 556; but this, as a general rule, must be regarded as unreasonable, because the debts due to the firm may not be capable of collection: *Williams* v. *Henshaw*, 12 Pick. 378; 23 Am. Dec. 614. Perhaps no test can be formulated applicable to all cases. On the one hand, it is unreasonable to compel the action for an accounting to be brought immediately after the dissolution of the partnership, and, on the other, not less unreasonable in many cases to postpone the right to an accounting until all the business of the partnership has been settled and the amount to which each partner will ultimately become entitled can be ascertained. If either of the partners is in possession of firm property, or is specially engaged in settling the affairs of the firm, he ought undoubtedly to have a reasonable time within which to perform the duties imposed upon him as a liquidating partner, and he cannot be regarded as in default while proceeding with reasonable diligence, nor can his copartner be deemed guilty of laches because he does not demand a settlement, and enforce his right to an accounting while the liquidating partner is pursuing the business intrusted to him with such diligence. The mere fact that some indebtedness in favor of the firm still exists, which may probably be collected, ought not to entitle either partner to postpone an accounting for an unreasonable

time. Hence, it is our judgment that the right to an accounting and the consequent operation of the statute of limitations, where one exists, must begin when the business of the firm is substantially closed, or when such a period has elapsed that it might have been closed, and that a partner delaying his suit or demand for an accounting after that time must regard the statute of limitations as beginning to run against his claim, and, on the other hand, that his suit cannot be successfully met by the plea of the statute, if it is brought within the time prescribed thereby, after the affairs of the firm were in such a condition that a substantial distribution of its assets could have been made had the defendant partner proceeded to exercise reasonable diligence in closing the business of the firm: *Hammond* v. *Hammond*, 20 Ga. 556; *Richards* v. *Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Holloway* v. *Turner*, 61 Md. 217; *Patterson* v. *Lilly*, 90 N. C. 82; *Askew* v. *Springer*, 111 Ill. 662; *Prentice* v. *Elliott*, 72 Ga. 154; *Jordan* v. *Miller*, 75 Va. 442; *Sandy* v. *Randall*, 20 W. Va. 244; *Gray* v. *Green*, 125 N. Y. 206; 142 N. Y. 316, *post*, p. 596; and the principal case.

Though the statute of limitations has completely run, so that no suit could be maintained for an accounting, yet if one of the partners after that date receives moneys or property belonging to the copartnership, the right of his partner to an accounting therefor may still be enforced, and his cause of suit regarded as arising only upon the actual receipt of such money or property: *Knox* v. *Gye*, L. R. 5 H. L. 656; *Taylor* v. *Morrison*, 7 Dana, 241.

The right to an accounting, though lost by the statute of limitations, may be revived by an acknowledgment or a new promise, by which the partner, theretofore protected by the statute, admits his liability and willingness to account, and recognizes the right of his copartners thereto: *Shelmire's Appeal*, 70 Pa. St. 281. Fraudulent concealment, by which the knowledge of his cause of suit was kept from the partner entitled to an accounting, may, as in other cases, prevent the running of the statute of limitations, and entitle him to have the time prescribed by such statute computed from the date of his acquiring knowledge of the facts constituting his cause of action, the knowledge of which was fraudulently concealed from him: *Todd* v. *Rafferty*, 30 N. J. Eq. 254; *Partridge* v. *Wells*, 30 N. J. Eq. 176; *Sanderson* v. *Sanderson*, 17 Fla. 820.

CHINA MUTUAL INSURANCE CO. *v.* FORCE.

[142 NEW YORK, 90.]

THE JUDGMENT OF A FOREIGN VICE-ADMIRALTY COURT purporting to dispose of the surplus proceeds of a wrecked vessel ordered to be sold by such court, remaining after paying an award of salvage moneys to the salvors, whereby such surplus was directed to be paid to a claimant thereof, is void as against other claimants who have not had any notice of the claim made to such fund nor any opportunity to contest such claim.

AN ADMIRALTY COURT HAVING JURISDICTION TO ORDER THE SALE OF A VESSEL and the payment of the claims of salvors has not, by virtue of its seizure and possession of such vessel, jurisdiction to determine claims to the surplus proceeds of the vessel, but before it can dispose of such proceeds must give due notice to adverse parties. If it allows claims to be paid before the legal right of the claimant is established by due process

of law, it is nothing less than allowing a man's property to be taken from him without his consent and without the judgment of the law.

A DECREE OF A FOREIGN VICE-ADMIRALTY COURT DISPOSING of the surplus proceeds of the sale of a vessel made *ex parte* upon a petitioner's statement, and without any notice to adverse claimants, is, as against the latter, void, and cannot defeat a proceeding brought to recover such proceeds from the claimant to whom they were paid under and by virtue of such decree.

SHIPPING.—FREIGHT IS NOT EARNED EXCEPT BY THE PERFORMANCE of the voyage and the delivery of the cargo to the place of destination, unless the contract provides for the payment of freight *pro rata itineris*. Therefore, in the absence of such contract, there can, in the event of the wrecking of the vessel before completing the voyage, be no valid claim for freight earned.

CONFLICT OF LAWS.—THE OBLIGATION OF THE SHIPPERS OF A CARGO to pay freight must be determined by the law of the place where the contract of affreightment was made, and the fact that the vessel was Italian cannot, where the contract was made in the United States, subject the contract of shipment to the operation of the Italian Commercial Code.

ACTION by insurers of the cargo of the bark, *Guiseppe Anna*, to recover a portion of the proceeds of the sale of such cargo. The bark was chartered in New York in 1889 to carry a quantity of oil thence to Rangoon, Burmah. The cargo was insured by the plaintiff, while the defendants advanced moneys to the master for necessary disbursements, and received from him a draft for the amount advanced and a pledge of the vessel and freight. The vessel was wrecked on the coast of Burmah near Bassein, and there was an abandonment, and a payment by plaintiffs as for a total loss, and they thereupon succeeded to all the rights of the assured in the cargo and its proceeds. Anthony Murphy, master of a steam vessel, was engaged for some weeks in salvage operations at the scene of the wreck, and succeeded in saving part of the cargo and some of the ship's stores. Subsequently he filed a petition for salvage in the recorder's court of Rangoon, of vice-admiralty jurisdiction. A short time previously the Chartered Bank of India, to whom had been sent the draft drawn by the master in favor of the defendants, filed its petition in the same court, setting forth the making of the draft, the wrecking of the vessel, the salvage effected by Murphy, and prayed for an order of arrest and sale of the ship and cargo, and the condemnation of the ship for the amount due the petitioner, subject to the claims of salvors. The vessel, with its cargo and furniture, was by the court ordered arrested, and a sale thereof was directed to be made at public auction, and the proceeds to be brought into court "reserv-

ing all questions as to the rights of the government to be paid salvage and of the rights of the parties to the suit." On December 18, 1889, the vessel was ordered to be sold by the court's bailiff in January, and the sale advertised. It was subsequently made, and the proceeds deposited as a common fund in the registry of the court. On April 29, 1889, the court made an order or decree in a proceeding instituted by the salvor, Murphy, decreeing him to be entitled to a sum specified as salvage, and another order in the proceeding of the Chartered Bank of India decreeing the payment to it of the surplus proceeds of the sale, after satisfying the claim of the salvor. Under this latter order such proceeds were paid to the bank and by them remitted to the defendants in this action. Judgment was given in favor of the plaintiff in the trial court and affirmed by the general term on appeal.

Harrington Putnam, for the appellants.

William W. MacFarland, for the respondents.

94 GRAY, J. The principal question, which is presented for our consideration relates to the effect which should be allowed to the decrees of the vice-admiralty court in Rangoon. No question is made about its exercise of jurisdiction in seizing and ordering the sale of the vessel, cargo, etc.; neither is any question made as to the rights of the salvor to receive salvage moneys out of the fund in the registry of the court. The question is whether, after seizure and sale of the property and the award of salvage moneys, the admiralty court could summarily proceed upon the application of the Chartered Bank of 95 India, etc., as it did, with respect to the surplus moneys in its registry. Was its decree as to that matter conclusive upon these plaintiffs, and are they debarred from setting up that, however conclusive may have been its decree with respect to the sale of the property, or the award of salvage moneys, they are not concluded from inquiring into the sufficiency of the proceedings to divest them of their proprietary interest in the remainder of the proceeds. After the best consideration I have been able to give to the subject, I think these questions are to be answered in the negative. I am not aware that any rule of the admiralty law requires us to answer them otherwise, and although the proceeding was *in rem*, nevertheless the court was bound to proceed, in the determination of rights to the proceeds, by proper judicial

proceedings; without which its decree could not, and ought not to, be conclusive. Mr. Justice Story observed in *Bradstreet* v. *Neptune Ins. Co.*, 3 Sum. 600, with respect to an essential element for the conclusiveness of a foreign judgment: "That element is that there have been proper judicial proceedings upon which to found the decree"; and he proceeds to describe them, mentioning the necessity of personal or public notice of the proceedings, so that the parties in interest may have an opportunity to be heard. Other than what the seizure of the vessel, cargo, etc., is deemed to import to the world, there was no notice of any kind to the owner of either, and if any publication was made in the whole proceeding, it was under an order directing the bailiff to advertise his sale in certain newspapers. Beyond the petition of the chartered bank for the condemnation of the vessel and the order for the payment of the petitioner from the proceeds, subject to the salvor's claim, the foreign record does not disclose any process or proceeding for the determination of the question of its right. Was this record sufficient to show that the court competently exercised its jurisdictional powers, so as to bind parties with adverse interests by its decree? I think not. The proceeding before the admiralty court was against the vessel, cargo, etc., and jurisdiction was acquired by their seizure; [oc] which is supposed to constitute due notice to all parties interested, and to empower the court to order the disposition of the property seized. It proceeded to order a sale of the vessel, cargo, etc., to protect all interests therein, and the effect of the sale was to discharge all liens and to transfer them to the proceeds. The sale passed the title to the property sold as to all the world; although the owners did not appear, and were not heard. The judgment of the court acting *in rem*, by general maritime law, extinguished the title of the owner, and is conclusive upon the title, transfer, and disposition of the property itself, in whatever place it may be found, and by whomsoever it may be questioned. These principles of admiralty law have been long settled, and are too familiar to need the citation of authorities.

There is no dispute here about the competency of the court in Rangoon to act upon the property and to sell it; nor, when the proceeds came into its registry, to direct the payment thereout of the salvor's claim. The difficulty is to see upon what legal principle the court could dispose of the sur-

plus proceeds remaining in the registry, without adjudging as to the title to them, in some manner which would exhibit an observance of essential legal processes. I think that the power of the court to act competently in a summary manner, as against adverse parties without notice, was limited to the seizure and sale of the property, and the award of salvage moneys to the salvors. Thereafter, the court, though in possession of and with jurisdiction over the fund, was bound to proceed in some regular way and upon some notice, in order to determine the relative claims of owners and claimants. I am quite unable to see how the mere order to pay the claim out of the surplus moneys is equivalent to an adjudication, which we must regard as conclusive in its nature. After ordering the sale of the property and adjudging upon the salvor's claim, the question of the right of the chartered bank to be paid from a fund, which belonged to others, was one *inter alios*, and in justice and in reason, as it seems to me, those other parties should have had their day in court. Subject to [97] the claim for salvage, the proceeds of the sale of the condemned property belonged to the owners of the vessel and cargo; whatever the liens against them. The principle of a jurisdiction in a court of admiralty power to act summarily and conclusively, without actual notice to parties interested in the property, would seem to have been sufficiently satisfied in the proceedings in question, without extending it so as to permit a disposition of these surplus moneys, upon the mere petition of a claimant, and without notice of any description. The forty-third rule of the admiralty rules adopted by the United States supreme court in 1844 reads that "any person having an interest in any proceeds in the registry of the court shall have a right, by petition or otherwise, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice." These rules represent the general course of admiralty practice, as it came to us from the civil law courts, as modified in English courts, and were intended to be in general harmony with the practice in the maritime courts of other nations: See Benedict's American Admiralty, secs. 11, 356; Henry's Admiralty Procedure, sec. 114.

The spirit of the rule referred to makes notice necessary to a valid decree, disposing of proceeds remaining in the registry of the court, and the appropriateness of its application is

not affected by the fact that the claimant here was already in court by its proceeding against the vessel. This surplus of proceeds in the registry of the court belonged, in legal contemplation, to the original owners of vessel and cargo, and were there for distribution only. It was the duty of the court to preserve them for all who had claims upon them; and if it allowed claims to be paid before the legal right of a claimant was established by due process of law, "it would be nothing else than allowing a man's property to be taken from him without his consent and without judgment of law": *The Phebe*, 1 Ware, 360, 365. It was remarked in *Harper* v. *New Brig*, Gilp. 546, that "the power [98] of a court of admiralty over these remnants or surpluses is not an arbitrary power, but is governed by principles, which the court is bound to observe before it acts, whether there be or be not a party in court having an interest or disposition to obtain a proper distribution of them." So far as this foreign record shows, the decree was *ex parte*, upon the petitioner's statement, and seems as little entitled to be regarded as conclusive as the sentence commented upon by Mr. Justice Story, in *Bradstreet* v. *Neptune Ins. Co.*, 3 Sum. 600. Upon authority, as well as upon principle, I think while the admiralty court retains jurisdiction over the disposition of the proceeds remaining in its registry, after satisfying the purpose for which its jurisdiction was originally called into exercise, which was, I consider, here the sale of the vessel and property saved, and payment of the salvors, that jurisdiction is competently exercised only upon due process of law, by which parties having adverse interests are given an opportunity to be heard. In *The Sybil*, 4 Wheat. 98, after salvage had been decreed out of proceeds a claim was interposed by the shipowners for freight and average. Mr. Justice Johnson, observing that the court was pretty well satisfied that no freight was earned, and that average might have been claimed, said: "In the case then depending, the circuit court could not have awarded either of those demands. The question is *inter alios*. There was no pretext for claiming either as against the salvors, and the shipowners ought to have pursued their rights by libel, or petition by way of libel, against the portion of the proceeds of the cargo which was adjudged to the shippers. These parties were entitled be heard upon such a claim, and could only be called upon to answer in that mode." In *Andrews* v. *Wall*, 3 How. 573, Mr. Justice Story said: "This is a case of proceeds

rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ** ownership thereof. This is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of materialmen, where, after satisfaction thereof, there remain what is technically called 'remnants and surpluses' in the registry of the admiralty." If these defendants had a maritime lien which survived the destruction of the vessel, and they had some proprietary interest in the proceeds in the registry of the court, the general rule as stated by Mr. Benedict, in his work on Admiralty, section 305, required that "before the proceeds are distributed, the court, on proper proceedings for such purpose, should adjudicate upon the claims to such proceeds arising from liens upon them."

In *Sheppard* v. *Taylor*, 5 Pet. 675, 711, it was remarked, with respect to the lien for the wages of seamen upon proceeds, that "it is the familiar practice of the court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds"; who, in that case, were the assignees of the owners.

I think our conclusion must be that the order or decree of the vice-admiralty court in Rangoon, directing the payment from the proceeds in its registry of the demand of the chartered bank, was not conclusive upon these plaintiffs. There was no actual adjudication upon the question of title, through those proceedings which are recognized to be proper, whether in admiralty, at common law, or in equity. That the decree of a foreign court of admiralty is conclusive, upon the point on which the condemnation of the property rested, is not to be disputed; but that it may decree conclusively upon other points incidental to the distribution of the proceeds, without some proper proceedings giving support to the decree, I am not prepared to admit.

Having reached that conclusion, there remains the question whether the defendants are not, nevertheless, entitled to retain the moneys so awarded to them. They say that they had a legal lien upon the cargo for proportional freight. The charter party provided for the payment of freight upon

delivery of 100 cargo at port of discharge. It is well settled that, unless the contract of parties provides for the payment of freight *pro rata itineris*, it is not earned except by a performance of the voyage and the delivery of the cargo at the place of destination: *The Tornado*, 108 U. S. 342; *New York Cent. etc. R. R. Co.* v. *Standard Oil Co.*, 87 N. Y. 486. I see nothing in this case to warrant us in saying that the facts constituted any exception to that rule. Nor is the question affected by the "law of the flag," as the defendants have argued. The fact that the vessel was Italian does not subject the contract of shipment to the operation of the Italian Commercial Code. The obligation of the shippers of the cargo is to be determined by the law of the place where the contract of affreightment was made. In the case of the *Liverpool etc. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, an action brought by an insurance company claiming to be subrogated to the rights of owners of goods on board the *Montana*, a British vessel, the question was elaborately discussed, in an opinion by Mr. Justice Gray, whether, where a contract was made in New York for the shipment upon a British vessel of goods to Great Britain, where the damage itself occurred, questions arising upon the contract should be determined by British law. Many cases in English and American courts were reviewed, including that in this court of *Dyke* v. *Erie Ry. Co.*, 45 N. Y. 113, 6 Am. Rep. 43, and upon the great preponderance, if not the uniform concurrence, of authority it was held that the nature, obligation, and interpretation of the contract are to be governed by the law of the place where it is made. "A contract of affreightment," it was said, "made in a country between citizens, or residents thereof, and the performance of which begins there, is to be governed by the law of that country, unless the parties clearly manifest a mutual intention that it shall be governed by the law of some other country": And see *Faulkner* v. *Hart*, 82 N. Y. 413; 37 Am. Rep. 574.

For the reasons expressed, I think the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

Judgments — Foreign Rendered Without Jurisdiction — Effect. — The record of a foreign judgment, where it appears, either from the face of the record or from other admissible evidence, that the court which rendered it had no jurisdiction of the parties or the subject matter will be regarded

as a nullity: *St. Sure* v. *Linsfelt*, 82 Wis. 346; 33 Am. St. Rep. 50, and note. A foreign judgment is conclusive upon its merits, and can be impeached only by showing that the court rendering it did not have jurisdiction of the subject matter of the action or of the person of the defendant, or it was procured by fraud: *Dunstan* v. *Higgins*, 138 N. Y. 70; 34 Am. St. Rep. 431, and note. It is well settled that courts will not entertain the judgment of a foreign tribunal if it appears from the record or by other evidence that the defendant has never been served with process according to the law of the place where the judgment was rendered: Extended note to *Lazier* v. *Wescott*, 82 Am. Dec. 412. See, also, the extended note to *Messier* v. *Amery*, 1 Am. Dec. 325.

SHIPPING—FREIGHT—WHEN EARNED.—Freight is a compensation for the transportation of goods from port to port, and is not earned until the voyage is completed: *Patapsco Ins. Co.* v. *Biscoe*, 7 Gill & J. 293; 28 Am. Dec. 219, and note; *Griggs* v. *Austin*, 3 Pick. 20; 15 Am. Dec. 175, and note; *Scott* v. *Libby*, 2 John. 336; 3 Am. Dec. 431; *Atwell* v. *Miller*, 11 Md. 348; 69 Am. Dec. 206, and note. Freight is the price to be paid for the actual carriage of goods by sea from port to port, and the delivery of the goods at their destination according to the charter party is a condition precedent to entitle the shipowner to freight: *Hager* v. *Donaldson*, 154 Pa. St. 242. See, also, the note to *Tio* v. *Vance*, 30 Am. Dec. 718.

COTTON *v.* BURKELMAN.

[142 NEW YORK, 160.]

A POWER OF SALE GIVEN IN A WILL IS SUBJECT TO THE RULE OF CONSTRUCTION applicable to the other parts of the will, to wit, that the intention of the testator is to be ascertained and carried out so far as possible.

WILLS—POWER OF SALE, WHEN CONTINUES.—If a testator gives his whole property to his wife for life, prescribing that it shall be in lieu of dower, and that the remainder in fee shall go to his daughter, and charging upon such property the support of his mother, and investing his wife "with full power to sell and dispose of all or any part of my real estate or personal securities of which I might die possessed as in her judgment may seem best for the benefit of our daughter," such power of sale does not terminate on the death of the daughter, but continues in the widow, because the primary object of the power was to benefit her as life tenant, and to enable her to secure by a sale and the investment of the proceeds a larger and more reliable income than the land itself would yield.

Hamilton R. Squier, for the appellant.

Thomas McAdam, for the respondent.

161 FINCH, J. This action was brought by the vendor of real estate for a specific performance of a contract of sale, and the defense of the vendee is that the vendor cannot convey a good title to the property. That defense depends entirely

upon the construction of the will of German Cotton, who gave to his wife, Margaret, a life estate in the land, with remainder in fee to his adopted daughter, Mary. She married, and has since 163 died, leaving a son, Edwin Talbot, in whom the remainder in fee has vested. The widow, Margaret, was made sole executrix, and the will proceeds thus: "With full power to sell and dispose of all or any part of my real estate or personal securities of which I may die possessed, as in her judgment may seem best, and to invest the proceeds of said sales as she may deem best for the benefit of our adopted daughter, Mary E. Cotton." It is over this power of sale that the controversy arises, for the purchaser contends that the sole purpose of the power was the benefit of the daughter, and she having died the object of the power is no longer attainable, and the power itself is forever extinguished, while, the vendor contends that the primary object of the power was to benefit the widow as life tenant, and enable her to secure by a sale of the land and an investment of the proceeds a larger or more reliable income than the land itself would yield, and that such purpose remains and feeds the power although the adopted daughter is dead; and so the deed tendered by the executrix in execution of the power is good and sufficient to carry the fee. The general term has so held, and we think the conclusion is correct.

The scope of the will leaves no doubt of the testator's intention. He gives all his property to his wife for the term of her natural life, prescribing that it shall be in lieu of dower, and charging upon it specifically the support of his mother. During the life of the widow he makes no provision for the adopted daughter, but assumes that his wife will provide for her as he and she had always done. He contemplates leaving behind him this family of three, and gives his whole property to his wife as the head and responsible manager during her life, to enable her out of the rents and income to provide for herself and for his mother and the adopted daughter. The power to sell his real estate was conferred upon his wife, as executrix, to meet emergencies liable in the future to threaten this purpose and object of his testamentary dispositions. The real estate might cease, from many causes, to furnish the necessary rents or income, and in that event the whole family 163 would suffer and not merely the wife alone. The very form of the power granted and the words used for its creation indicate that its chief purpose was the benefit and safety of

the life tenant. The testator makes her sole executrix, and commits wholly to her judgment the time, mode, and terms of sale; and interposes his directions only as respects the mode of investing the proceeds. That duty is to be done with principal regard to the interests of the daughter as entitled to the estate in remainder. The widow might be tempted by a greater interest to take a weaker security, and so he requires the investment to be such as will best secure the ultimate transfer of the fund to the daughter. The power of sale was not given or intended for the latter's benefit as devisee of the remainder. She was safer if any such authority should be withheld. The obvious purpose was to secure against possible emergencies the income devoted to the support of the widow, and through her that of both mother and daughter. This purpose survived the death of the daughter, and was in no manner dependent upon her life, and her death left the power still existent and capable of execution. The cases in this country do not hesitate to apply to powers the leading principle governing the construction of a will which requires us to ascertain and carry out the intention of the testator so far as possible (*Peter* v. *Beverly*, 10 Pet. 564), and that intention in the present case seems to me quite clear and certain.

Much was said on the argument as to the grant of the power to the executrix, instead of to her as an individual or as life tenant. It is not necessary to argue the point in view of what this court has already settled. In *Sweeney* v. *Warren*, 127 N. Y. 434, 24 Am. St. Rep. 472, it was said that "undoubtedly a power may be vested in executors, as such, to be exercised for their own benefit as individuals," and it was added that "when a power is conferred upon executors by virtue of their office, and not on them as individuals, there being no other evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit." The [164] appellant here relies upon that presumption, but it does not arise because there is the evidence referred to that the power was given to the executrix for her own benefit as life tenant. Nothing in the condition of the estate required it; every thing in the situation of the widow made it necessary for her possible protection.

We hold, therefore, that the power of sale was not extinguished by the death of the adopted daughter, and that the deed of the executrix will convey a good title.

The order of the general term should be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All concur.

Ordered accordingly.

POWER OF SALE IN WILL—HOW CONSTRUED.—A power of sale contained in a will should be liberally construed in order to effect the purpose and intent of the will: *Boyd* v. *Satterwhite*, 10 S. C. 45; *Geiger* v. *Kaigler*, 15 S. C. 262; *Wilkinson* v. *Buist*, 124 Pa. St. 253; 10 Am. St. Rep. 580.

POWER.—SURVIVORSHIP OF: See the extended note to *Rankin* v. *Rankin*, 87 Am. Dec. 214.

ETTLINGER *v.* PERSIAN RUG AND CARPET CO.

[142 NEW YORK, 189.]

CORPORATE BONDS, SUIT WITHOUT TRUSTEE BEING PARTY.—The holder of a bond secured by a trust mortgage may maintain an action to foreclose such mortgage if the trustee has become incompetent to act. It is not necessary to first procure the appointment of a new trustee.

CORPORATE BONDS, SUITS UPON.—If the trustee of a trust mortgage to secure corporate bonds refuses to sue or is incompetent to do so by reason of his insanity, the holder of one of such bonds, in his own name, may sue to foreclose the mortgage. Any emergency which makes the demand upon a trustee futile or impossible, and leaves the bondholder without any reasonable means of redress, justifies his appearing as a plaintiff for the purpose of foreclosure.

ACTION by a holder of a bond issued by the defendant, the Persian Rug and Carpet Company, and secured by a mortgage executed by it. Theodore Schumacher, also a holder of one of such bonds, and Paul M. Kraus, to whom, as trustee, the mortgage was made, were parties defendant in this action. The judgment of the trial court was in favor of the defendant Schumacher, and directed the dismissal of the complaint. On appeal to the general term this judgment was reversed, and a new trial ordered, and thereupon the defendant Schumacher appealed to this court.

Francis B. Chedsey, for the appellant.

Thomas P. Wickes, for the respondent.

191 FINCH, J. The determination of a single question discussed on the argument will dispose of this appeal. The plaintiff was one of two bondholders protected by a trust mortgage. His complaint showed all the facts necessary to a judgment of foreclosure if the action had been brought by the trustee, and sought to justify his intervention as bond-

holder and plaintiff in the action upon the ground that the trustee had left this country, and was somewhere in foreign parts, and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had also departed to join him [192] abroad; and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The special term dismissed the complaint upon the ground that the bondholder could not sue where there was a competent trustee unless the latter refused to act, and where the trustee had become incompetent it was necessary first to procure the appointment of a new trustee. The dismissal of the complaint did not go upon any failure of proof, but assuming the allegations of the complaint to have been established, still held that the plaintiff could not sue for a foreclosure. An appeal was taken to the general term, which reversed the judgment, and ordered a new trial. Instead of going back and presenting his defense so far as he had one, the defendant, who was the remaining bondholder, and for whose interest a foreclosure was as much of a necessity as for that of the plaintiff, adopted the perilous experiment of an appeal to this court, with the required stipulation for judgment absolute. It appeared on the argument that the defendant was injured only at a single point: not by the foreclosure; not by its natural and proper result; not even by the appointment of a temporary receiver; but by a sale of the property claimed to have been collusive, and which vested title in the plaintiff for less than the real value. All that could have been remedied on a new trial. A resale could have been ordered, or the plaintiff compelled to account for the property at its just and fair value, which would have given to the defendant every thing to which he was entitled. Seeing the situation and observing the defendant's danger, we suggested to his counsel on the argument the prudence of escaping it by a withdrawal of his appeal. He declined the suggestion, and if any hardship results it will not be the fault of the court.

We are satisfied that the plaintiff had the right to maintain the action, and that fact alone justified the reversal of the judgment by the general term. It is conceded that the beneficiary may sue where the trustee refuses, but that is because there is no other remedy, and the right of the bondholder, [193] otherwise, will go unredressed. The doctrine does not rest rigidly upon a technical ground, but

upon a substantial necessity. In the case of a corporation a stockholder may sue, not only because it refuses, but because those who represent it are the very parties who have committed the wrong: *Brinckerhoff* v. *Bostwick*, 88 N. Y. 52. In that case we said that a demand upon the corporation to sue would be "futile" and so was "unnecessary," and since the action could not be "effectually prosecuted in that form" the shareholders might sue. What occurred in the present case was tantamount to, and an equivalent of, a refusal by the trustee. He had gone beyond the jurisdiction; the whole apprehended mischief would be consummated before he could be reached; and if reached there was sufficient reason to believe that he was incompetent. But the special term say that in such event a new trustee should have been appointed. That simply reproduces the same difficulty in another form, for a court would hardly remove a trustee without notice to him and giving him an opportunity to be heard. And why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dictates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs sets the court in motion. The bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress, should justify his appearance as plaintiff in a court of equity for the purpose of a foreclosure.

It is unnecessary to consider or discuss other questions, which were numerous. What we have said requires us to affirm the order of the general term, and award judgment absolute against the defendant upon his stipulation, with costs.

All concur.

Ordered accordingly.

BONDS SECURED BY TRUST MORTGAGE—FORECLOSURE BY BONDHOLDER. A trustee, as mortgagee, representing the interests of all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but, if he unreasonably neglects or refuses to discharge his duty in the premises, any bondholder may bring an action to enforce the security for the common benefit: *Chicago etc. Ry. Co.* v. *Fosdick*, 106 U. S. 68, cited in *Siebert* v. *Minneapolis etc. Ry. Co.*, 52 Minn. 156; 38 Am. St. Rep. 534.

MURPHY *v.* JACK.

[142 NEW YORK, 215.]

TELEPHONE, COMMUNICATIONS BY, NECESSITY OF IDENTIFICATION.—If an affidavit in support of an attachment is made by an attorney for the plaintiff upon information and belief, and states that such information and belief are based upon the statement of the plaintiff and his attorney at another place, "where they both talked to affiant this morning, over the telephone, and narrated the facts to deponent exactly as they have been set forth in the complaint," such affidavit is not sufficient to support an attachment issued thereon, unless it further appears that the affiant was acquainted with the plaintiff, and recognized his voice, or otherwise knew it was the plaintiff who was talking.

ACTION for goods sold and delivered. The complaint was upon information and belief, verified by one of the plaintiff's attorneys. An affidavit was made by the same attorney for the purpose of procuring an attachment, in which affidavit facts were stated, on information and belief, sufficient, if true, to authorize the issuing of the attachment, but the affiant stated that his belief was based upon the statements of the plaintiff and the plaintiff's attorney, "who have both talked to deponent this morning, over the telephone, from Boston, and narrated the facts to deponent exactly as they have been set forth in the complaint." An attachment having issued, it was, on application of the defendants, vacated, but upon appeal the general term reversed the order vacating the attachment, and directed it to be reinstated, and thereupon the defendants appealed to this court.

William S. Maddox, for the appellants.

Edward B. Hill, for the respondent.

217 GRAY, J. If the affidavit was insufficient upon which this attachment was ordered, a question of law is presented, and the order of the general term is undoubtedly reviewable here: *Allen* v. *Meyer*, 73 N. Y. 1; *Steuben County Bank* v. *Alberger*, 78 N. Y. 252. In this case the writ was applied for upon statements made upon the information and belief of the deponent, and the question is whether the information concerning the material facts appeared to have been acquired in such a manner as to justify the judge in acting upon it. Was the source of the information such as the judge could accept as satisfactory? The affiant, in such cases, is not required to have a personal knowledge of the facts required to be stated; but it is essential that his information must

appear to have been competently derived, as otherwise the judicial officer, whose action has been invoked, is without jurisdiction to proceed. It is clear that the attorney in this case obtained his information by a communication made through the telephone upon the morning of the day upon which the complaint and affidavit were sworn to, and that his belief was based upon it in making his statements concerning the facts constituting the cause of action, the absence of counterclaims, and the nonresidence of the defendants. Those were the material facts required to be proved to the satisfaction of the judge, and we do not think that the proof as to the source of the information concerning them was sufficient; for the reason that there was lacking any degree of certainty that the plaintiff himself ever made the communication to the affiant. There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff, and recognized his voice; or if it had appeared in some satisfactory way that he knew it was the plaintiff who was speaking with him. None of these facts, however, [218] were averred. There was absolutely nothing upon which the judge could pass to show that it was the plaintiff who was speaking, and not some undisclosed person, who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection to which the invention of the telephone has been brought has immensely facilitated the intercommunication of individuals at distant points, and inasmuch as the voice of the speaker is heard in most, if not in all, cases, the identification of the speaker should be possible. The very facility of communication and of identification permits, and therefore imposes a duty upon, the party who invokes judicial action upon the strength of information so received, to state his knowledge, or his grounds for believing, that it actually came from the party required to furnish it. To authorize an attachment to issue upon the affidavit furnished here was in disregard of the rule which requires that the source of information shall be disclosed in such a way as to enable the court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts. Judicial action upon such a source of information as was here disclosed was justified below by analogy with telegraphic communication. The analogy is incomplete. If the information comes through the telephone

it is quite possible to identify the speaker. Then, too, there is not, in the case of a telephonic communication, any record, like the message, which, in the case of the use of the telegraph, remains for reference and verification.

For these reasons, as well as for those stated in the opinion of Mr. Justice Barrett, at special term, and of Mr. Justice Van Brunt, dissenting at the general term, the order of the general term should be reversed, and that of the special term should be affirmed, with costs in all the courts.

All concur.

Ordered accordingly.

AFFIDAVIT ON INFORMATION AND BELIEF—SUFFICIENCY OF.—An affidavit on attachment made by the plaintiff's attorney, containing a positive allegation of the indebtedness, but stating that the allegation is made upon information received from letters written by the plaintiff to the deponent, and from a sworn statement of account in deponent's possession, and that he believes such information to be true, is not sufficient: *Trautmann* v. *Schwalm*, 80 Wis. 275. In order that affidavits for attachment containing averments of fact based on information and belief be sufficient, the sources of information must be fully stated: *Roddey* v. *Erwin*, 31 S. C. 37. That affidavits for attachment on information and belief are not sufficient, see *Miller* v. *Munson*, 3 Wis. 579; 17 Am. Rep. 461; *Dyer* v. *Flint*, 21 Ill. 80; 74 Am. Dec. 73, and note, and the note to *Simpson* v. *McCarty*, 12 Am. St. Rep. 40. See particularly the note to *Fridenberg* v. *Pierson*, 79 Am. Dec. 167.

PEOPLE v. MARTIN.

[142 NEW YORK, 228.]

CERTIORARI—JUDICIAL ACTS, WHAT ARE.—If the board of police commissioners are directed by law to publish the list of nominations in a newspaper having the largest circulation within the city and county, and which advocates the principles of the political party which at the last election cast the greatest number of votes in such city, the commissioners, in designating the newspaper, act judicially, and their determination may be reviewed on *certiorari* at the instance of a publisher of a newspaper claiming to have been entitled to be awarded the publication of such list.

CERTIORARI WILL ISSUE TO REVIEW A DETERMINATION though the time has passed when the decision can have any practical operation, if the questions involved are of public importance.

CERTIORARI—JUDICIAL ACTION OF POLICE COMMISSIONERS.—If the board of police commissioners are required to publish certain lists of nominations, and to select certain newspapers which, according to the best information they can obtain, have the largest circulation within the city and county, they must act in good faith, and not proceed without making inquiry, but are not bound to resort to any particular evidence, nor

to give the various newspaper representatives a formal hearing. If they allege in their return to the writ of *certiorari* that, in designating the newspaper, they selected that which, according to their best information, had the largest circulation in the city and county, such return must be received as true, unless some proceeding was taken to compel them to make a further return.

CERTIORARI to the board of police commissioners of the city of New York to review their proceedings in designating certain newspapers in which should be published lists of nominations of candidates to be voted for at an ensuing election. The proceedings of the commissioners were confirmed, and an appeal was thereupon taken to this court.

John M. Bowers, for the appellant.

D. J. Dean, for the respondents.

[223] EARL, J. In the Election Law, chapter 680, section 61, it is provided that, at least six days before an election to fill any public office, the board of police commissioners of the city of New York shall cause to be published in not less than two, nor more than four, newspapers within such city, a list of all nominations for candidates for offices to be filled at such election, and that "one of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the largest number of votes in the state; and another of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the next largest number of votes in the state. The clerk or board, in selecting the respective papers for such publication, shall select those which, according to the best information he can obtain, have the largest circulation within such county or city. In making additional publications, the clerk or board shall keep in view the object of giving information, so far as possible, to the voters of all political parties; and in no event shall additional publications be made in two newspapers representing the same political party."

[224] The relator is right in claiming that the police commissioners in designating the newspapers act judicially; that their determination may be reviewed by writ of *certiorari*, and that the relator had sufficient interest to institute this proceeding; and while the time has long since passed when any decision in this matter can have any practical, efficient

operation, we will, in view of the public importance of the questions involved, overlook that circumstance and proceed to the determination of the matter upon its merits, upon the facts as they appear in this record.

The police commissioners cannot under this act, arbitrarily designate the newspapers without making any inquiry or any effort to obtain the best information as to their circulation. They must act in good faith and seek for information as to the circulation of the newspapers, and in making the designation they must act according to the best information they can obtain. But they are not bound to resort to any particular evidence, nor to give the various newspaper representatives a formal hearing. They can receive affidavits, examine books, or make other inquiries satisfactory to them, for the purpose of ascertaining which of the newspapers has the largest circulation within the city. If they are furnished with formal proof by the representatives of any newspaper, they should receive it and act upon it. If evidence, not open to suspicion or doubt or question, is furnished to them, showing that any particular newspaper has the largest circulation, they should receive and act upon such evidence, giving to it its proper force and effect. In other words, they should act fairly, seeking for the best information to guide them in the exercise of their judicial discretion in the selection of the newspaper under the act. All sources of information are open to them as they are open to assessors of property for taxation, who are to proceed upon diligent inquiry and the best information they can obtain: 2 Rev. Stats., 7th ed., 990, 991, 994; *People* v. *Trustees of Ogdensburgh*, 48 N. Y. 390.

Now, what facts have we here? At the time the police commissioners designated the newspapers they had not been 225 furnished with any evidence by the relator that the *World* had a larger circulation in the city of New York than any other newspaper. The entire circulation may have been larger than that of any other newspaper in the whole country, and yet its circulation may not have been so large in the city of New York as some other newspaper published there. The offer of the relator, on the 25th of October, then to show that the circulation of the *World* in the city of New York was larger than that of any other newspaper, came too late, as the designation had then already been made. There is absolutely nothing in this record showing that the determination of the police commissioners was erroneous, or from which we can deter-

mine that they did not exercise their jurisdiction regularly and rightfully. We are bound to take their return as true, and in it they allege that in designating the papers, they selected those which, according to the best information they could obtain, had the largest circulation in the city of New York; and thus they certified that they had actually and literally complied with the statute. If the return was evasive, or not sufficiently full, they could have been compelled, under section 2135 of the code, to make a further return. They could have been required to return what action they took and what information they sought and obtained in reference to the circulation of the newspapers. But, instead of asking for a further return, the relator was content to stand upon the return as made. We are bound to take the return here as absolutely true. If it be false, the relator has its remedy by an action against the police commissioners for making a false return, in which action it can recover its damages suffered in consequence thereof: *People* v. *Fire Commrs.*, 73 N. Y. 437.

Therefore, because we cannot in this record discover any error in the proceedings or determination of the board of police commissioners, the order of the general term should be affirmed, with costs.

All concur.

Order affirmed.

CERTIORARI TO REVIEW JUDICIAL ACTION.—Writs of *certiorari* issue only to inferior courts, and only to review judicial action: *In re Saline County Subscription*, 45 Mo. 52; 100 Am. Dec. 337. The writ of *certiorari* is appropriate only to review the judicial action of inferior courts, or public officers or bodies exercising judicial functions: *People* v. *Board of Supervisors*, 131 N. Y. 468. See on this question the extended notes to *Mayor* v. *Morgan*, 18 Am. Dec. 236; *Duggen* v. *McGruder*, 12 Am. Dec. 532, and the notes to *Railway Co.* v. *Ryan*, 13 Am. St. Rep. 869, and *Wulsen* v. *Supervisors*, *ante*, pp. 29 to 46.

JUDICIAL ACTS—WHAT ARE.—Judicial acts are such as are performed by a court touching the rights of persons or property: *Flournoy* v. *Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468, and extended note.

GRAY *v.* GREEN.

[142 NEW YORK, 214.]

PARTNERSHIP.—AT THE DISSOLUTION OF A PARTNERSHIP EACH OF ITS MEMBERS has an equal right to the possession of its assets, and is under an equal duty to apply them to the discharge of its obligations.

PARTNERSHIP—STATUTE OF LIMITATIONS IN SUITS FOR AN ACCOUNTING.—If after the dissolution of a partnership, all of its members act as liquidators with equal rights and duties, and neither is guilty of any wrong in the process of liquidation, a cause of action by one against the other for an accounting does not exist until the liquidation is substantially complete. Therefore, though one of them had, prior to the dissolution, withdrawn moneys from the firm without right as between himself and his copartner, the latter may, by a suit for an accounting brought as soon as a complete adjustment of the partnership affairs was possible, recover moneys so withdrawn. The statute of limitation against such suit does not begin to run at the time of the withdrawal of the moneys, nor at the dissolution of the partnership, nor from any date prior to the time when a complete adjustment of its affairs can be made, if there has been no demand made for the return of the moneys withdrawn and no refusal to account for them before the complete adjustment of the partnership business became possible, and such adjustment was not delayed by the fault of either partner.

SUIT for the dissolution of a firm of stockbrokers, and for an accounting between the members thereof and a judgment in favor of the plaintiff for such balance as should be found due him. A judgment was entered in favor of the plaintiff by the trial court and afterwards affirmed by the general term.

Wheeler H. Peckham, for the appellant.

Elihu Root, for the respondent.

218 FINCH, J. When this case was before us on a previous appeal (125 N. Y. 203), we reversed the judgment and ordered a new trial, holding that upon the facts then disclosed the cause of action proved under the pleadings accrued at the date of the dissolution of the partnership. It then appeared that such dissolution was effected by mutual consent, and that the duty of liquidation had been assigned solely to the plaintiff, a fact about which there was no controversy and which stood both found and admitted. It further appeared that just before the dissolution the defendant had withdrawn from the assets, without right as between himself and his partner, the sum of about ten thousand dollars, and that a restoration of that sum to the fund in the hands of the liquidator was necessary to enable him to per-

form his duty in the payment of partnership debts or to reimburse his own means so already applied. We determined thereupon that the latter had the right to that relief before the end of the liquidation and whenever circumstances made it necessary; that he could reclaim it at once when the defendant denied his duty to restore it, and insisted upon holding it by force of an alleged settlement made at the date of the dissolution; that the liquidating partner was not bound to wait till the close of the liquidation, but might sue at once to solve the disputed right, even though an accounting might be essential to the result. Looking back upon that conclusion in the light of such criticism as it has received, and seeking to appreciate its just force, I am still satisfied that our determination was correct upon the situation as we then understood it, and upon the facts which appeared upon the record.

But a very great change has come over those facts, so 819
great that I have examined again the earlier record to see whether I may not have misunderstood or misinterpreted them. That examination shows that the court explicitly found as a fact the appointment of the plaintiff as "the liquidating partner of the partnership," and the defendant's answer denies liability for any overdraft, and alleges a settlement made at the date of the dissolution. But now the vital and fundamental fact upon which our previous opinion stood, which was the appointment and authority of the plaintiff as the exclusive agent for winding up the partnership affairs, has wholly disappeared, and with it has gone the further fact that there was disagreement between the parties immediately upon the dissolution and an antagonism of claims, for now it is found that Gray was not made liquidator, that both parties acted as such, that both have acted faithfully, and that defendant has recognized that there was no settlement at the date of the dissolution by joining in the liquidation and asking credit in its results. How this remarkable and fundamental change in the facts occurred has been the subject of discussion on the argument. The defendant maintains that the evidence has not changed, but only the judgment of the trial court upon it; that the finding on the first trial was right and on this one is wrong, and that the change had its origin in an effort to evade the judgment of this court. I do not deem that criticism just. Looking over the evidence I feel bound to say that there is rea-

sonable explanation of the change, and much in the conduct of the parties which is in accord with the later finding, and that at all events it has such support in the proof as to put it beyond our review, and compel us to accept it as the truth.

It follows that we can no longer treat the action as one by the chosen liquidator, whose right to all the assets has been denied, to reclaim such assets needed for the liquidation, and must regard it simply and wholly as an action by one partner after a dissolution to compel an accounting and adjustment of the partnership affairs. The complaint readily admits of that construction, and since the present findings disclose no other [320] cause of action we must treat it as one for a final accounting. We cannot now say that the cause of action established was one which arose at or near the date of the dissolution. The fact which caused its origin at that date has been eliminated, and in its room no other fact requiring or justifying the intervention of equity is to be found until a much later period.

In *Gilmore* v. *Ham*, 142 N. Y. 1, *ante*, p. 554, we had occasion to express concurrence in the doctrine of the federal court that where a liquidation is proceeding with due diligence, without antagonism between the parties, or cause for judicial interference, the right of action for an accounting and payment over of shares arises when the liquidation is or ought to be complete, because until then there can be no adequate ground of complaint. That is more obviously true where both parties are, as upon the findings they were here, authorized to wind up the affairs. Where no special agreement as to the liquidation is made the partnership, although dissolved, continues for that purpose, and each of its members has an equal right to the possession of its assets, and are under an equal duty to apply those assets to the discharge of the debts: *Robbins* v. *Fuller*, 24 N. Y. 570. While each is so engaged, acting with reasonable diligence and without discord, there is nothing to complain of and no occasion for the intervention of equity until a final settlement is possible in which one party or the other refuses or neglects to join. Before that each may collect debts due, and if one is slow the other may be swift. Each may pay off liabilities until assets are exhausted, and neither can complain of the other until some emergency arises in which a right is denied or violated, or unduly delayed. The findings in the present case show a joint and amicable

action down to a brief period before the commencement of the suit. An accurate and complete adjustment was delayed, without the fault of either party, by the impossibility of at least three collections; and it was not until they were accomplished that the ultimate result could be known. While there was in the hands of defendant Green the amount of his overdraft made before the dissolution, he could apply it to the purposes of the liquidation [321] and pay out of it liabilities of the firm. There is no finding or request to find that he refused to do so until his refusal to account. Gray could not disturb his possession until at least the fund was needed as an asset and Green refused to properly use and apply it. Upon the findings now made, it is impossible to hold, as we did upon the very different findings of the former trial, that the plaintiff's cause of action is barred by the statute of limitations. I think he has so changed the facts as to make our previous conclusion inapplicable. In all these actions between partners, the application of the statute necessarily depends upon the circumstances of each particular case. The cause of action may arise, as in *Brush* v. *Jay*, 113 N. Y. 482, before the dissolution, and have that for its primary object; it may arise, at or near the dissolution, when one is made exclusive liquidator and his right to the possession of assets is denied and resisted: *Gray* v. *Green*, 125 N. Y. 203; it may arise when a nonliquidating partner sues the liquidator within a reasonable time after the dissolution, as in *Gilmore* v. *Ham*, 142 N. Y. 1, *ante*, p. 554; or where, as here, both parties act as liquidators with equal rights and duties, and neither is guilty of any wrong in the process, the cause of action may arise later, and necessarily will not exist until the liquidation is substantially complete. These are recent instances, but do not at all cover the varieties of form and incident which these actions may develop, so that always the running of the statute cannot be governed by any rigid or formal rule, but must depend upon circumstances. Those circumstances have in this case been so changed by the findings as to make it our duty to hold that the statute of limitations did not operate to bar and defeat the action.

The judgment should be affirmed with costs.

All concur, except PECKHAM, J., not voting.

Judgment affirmed.

PARTNERSHIP—ACCOUNTING.—LIMITATIONS OF ACTIONS: See the discussion of this question in *Gilmore* v. *Ham*, 142 N. Y. 1; *ante*, p. 554, and note.

PARTNERSHIP—DISSOLUTION—RIGHTS OF MEMBERS.—After dissolution *inter vivos*, the joint interest of the partners continues in the partnership property, and the mutual agency continues with some restrictions until the affairs of the partnership are administered: *Kinsler* v. *McCants*, 4 Rich. 46; 53 Am. Dec. 711, and note; *Ellicott* v. *Nichols*, 7 Gill, 85; 48 Am. Dec. 546, and note. Each partner has the same rights after the dissolution of his firm, in the fulfillment of its outstanding engagements and in the settlement of its business generally, as he had before: *Western Stage Co.* v. *Walker*, 2 Iowa, 504; 65 Am. Dec. 789, and note with the cases collected. See extended note to *Gilmore* v. *Ham*, *ante*, pp. 561 to 576.

BLEWITT *v.* BOORUM.

[142 NEW YORK, 357.]

CONTRACT—DELIVERY OF IN ESCROW TO AN OBLIGEE.—A written contract, whether under seal or not, may, by parol, be proved to have been delivered to the obligee upon a parol condition that it was not to become binding until the happening of a future event, and may be avoided upon the further proof that such event has not occurred, especially if the contract is one not required to be under seal.

Isaac N. Miller, for the appellant.

James L. Bishop, for the respondent.

358 PECKHAM, J. This action was brought to obtain an accounting from defendants and for damages sustained by plaintiff by reason of the violation of a certain contract, under seal, entered into between the parties to the action in relation to the right to manufacture and sell a temporary kind of binder for books, called the "Common Sense Binder," and for which letters patent had been issued.

359 The defendants admitted the execution of the contract, but alleged that it had been executed upon the parol condition that it was not to operate as a contract until the plaintiff acquired the interest of a third person in the patent spoken of in the agreement, and it was alleged that the plaintiff had never performed the condition. Evidence showing that the contract was executed with the condition above stated, and that the condition had never been performed, was offered upon the trial and received by the court, under proper objection and exception on the part of the plaintiff, and, after the evidence was in, the court found the fact in accordance with defendants' contention and gave judgment dismissing

the complaint, which was affirmed at the general term, and from such affirmance the plaintiff has appealed to this court.

The case of *Reynolds* v. *Robinson*, 110 N. Y. 654, holds that a writing which is in form a complete contract, and which has been delivered, may be proved to have been delivered upon a parol condition that it was not to become a binding contract until the happening of some event in the future, and that such event had not occurred. The cases cited in the brief opinion fully bear out the statement.

The plaintiff here contends that the authority of that case must be confined to contracts which are not under seal, and, as the contract here was a sealed one, the case has no application.

Of course the mere presence or absence of a seal upon a writing would seem to be a matter of the smallest importance upon the question now under consideration. The same reasons would apply with equal force for receiving or rejecting the contemporaneous parol understanding where the writing was sealed, as where the seal was absent. It is a question in each case as to whether there has or has not been an executed and completed agreement or act. Many of the old English cases held the doctrine that where there was a writing bearing upon its face the marks that it was fully and completely executed, if there were a delivery of the writing to the party himself there could be no parol evidence that the delivery was upon a condition or in escrow. The reason assigned in many cases [sic] was that such evidence would lead to the result that a bare averment without any writing would make void every deed. The word "deed" was not used in its restricted sense of a written instrument conveying land, or some interest therein, but in the sense that it was a writing of the party, and hence his act or deed. In *Williams* v. *Green*, 1 Cro. Eliz. 884, the action was one of debt on a bill. There was no seal attached. The plea was that the bill had been delivered to the plaintiff as a schedule (a memorandum), upon condition that if plaintiff delivered to defendant a horse upon a certain day, then the schedule was to be his deed, otherwise not, and that plaintiff had not delivered the horse. The plaintiff demurred to the plea, and it was resolved by the whole court to be a bad plea, for a deed could not be delivered to the party himself as an escrow, because then a bare averment without any writing would make void any deed. The decision was not based upon the question of a seal, and the

paper was referred to as a deed simply by way of description of an act of the party in delivering a written instrument which ought not to be rendered void by a parol contemporaneous understanding or agreement. The reason would apply with equal force to all written instruments, sealed or unsealed. Other cases of a nature where the writings needed not to have been under seal, and where it was held that they could not be delivered conditionally to the party to the instrument, are cited in 2 Coke on Littleton, 276, Philadelphia edition, 1827; 1st American from last London edition. On the other hand, there is one case which decided that a writing obligatory could be delivered in escrow to the obligee: *Hawksland* v. *Catchel*, 1 Cro. Eliz. 835; but after differences of opinion among the judges it was finally resolved otherwise in later cases, as stated in Coke: 2 Coke on Littleton, 276, Philadelphia edition, 1827; 1st American from last London edition.

These cases show that the rule preventing parol evidence of a delivery to the party upon condition, was not founded upon the presence of a seal to the writing, but the rule was adopted because when the words were contrary to the act (of delivery), the words were regarded as of no effect, for it was not what [361] was said, but what was done, that was in such case to be regarded. Hence, a delivery to a party was said to be inconsistent with any condition attached to it, and a condition was in fact a contradiction of the writing, and parol evidence of the condition was, therefore, inadmissible. A different view was subsequently taken of this act of delivery. The courts said it was not a contradiction of the terms or legal effect of the writing, but it was proof simply that no contract had in fact been entered into. They said that the production of a writing purporting to be an agreement by a party, with his signature attached, afforded a strong presumption that it was his written agreement, but if at the time the parties agreed that the writing was not to take effect as an agreement until the happening of some event, in other words, that it was agreed upon conditionally, then it should not take effect until the happening of the event or the fulfillment of the condition: *Pym* v. *Campbell*, 6 El. & B. 370. Crompton, J., in the above case, in speaking of an instrument under seal, said it could not be a deed until there was a delivery, and when there was a delivery that estops the parties to the deed, which was a technical reason why a deed could not be delivered as an escrow to the other party. He

said the parties may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. In truth, however, the court of exchequer in *Bowker* v. *Burdekin*, 11 Mees. & W. 128, had already distinctly stated that a delivery of a deed to a party might be in escrow, even though the condition were not in express words, if from the circumstances attending its execution it could be inferred that it was not delivered to take effect as a deed until a certain condition were performed. Baron Parke said in that case it was now settled law, though it was otherwise in ancient times, that in order to constitute the delivery of a writing as an escrow, it was not necessary that it should be done by express words, but you are to look at all the facts [602] attending the execution, and though in form it was an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will still operate as an escrow. The deed was in that case delivered to the party who was to take a benefit under it, and while the court held it was in fact an absolute delivery, the learned judges admitted that it might have been delivered conditionally to a party, and, if so, it would not take effect until condition performed. And in *Gudgen* v. *Besset*, 6 El. & B. 986, the lease of premises for a term of years was signed, sealed, and delivered to the party, although after such delivery the grantor retained the lease in his possession. The agreement was that it was not to take effect until lessee paid one hundred pounds, fifty only being then paid. The court from all the facts in the case held that the clear inference was that the instrument should not operate as a lease until full payment, and if there were such an agreement, though no express words of delivery as an escrow were used, it would not operate as a deed until payment was made, and consequently the lessee, although in possession of the premises, was tenant only from year to year, and not tenant under the deed. Campbell, chief justice, holding that the formality of delivering the instrument to a third person as an escrow was not essential when it was intended to operate as such. Looking at all the facts the learned judge said it must have been the intention of the parties that the instrument should not operate as a lease till the money

was paid, and that neither party intended that the interest in the term should vest till then.

As a result of the examination of the English authorities I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event.

[363] In this state in *Lovett* v. *Adams*, 3 Wend. 380, it was said by Savage, C. J., that if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act of the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then there is no contract. The court held that evidence of such facts should have been admitted. So the presence of a seal was considered no obstacle to parol proof that the writing was delivered to a party to the instrument upon a condition which had not been performed. The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally, or as is said in escrow, and when delivered to a party the delivery operates at once, and the condition is unavailable: *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543; *Worrall* v. *Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Braman* v. *Bingham*, 26 N. Y 483; *Wallace* v. *Berdell*, 97 N. Y. 13, 25.

Whether there is any sound basis for a distinction between cases relating to real estate and other kinds of written instruments, it is not now important to inquire, for the rule that instruments of the former character cannot be conditionally delivered to a party is too firmly established in this state to be overruled or even questioned. In *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543, Bronson, J., says it is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing

their object. In *Arnold* v. *Patrick*, 6 Paige, 315, the writing involved was a deed of land, and the remark of the chancellor, that the rule applied to any sealed instrument, was beyond the question. He refers as authority for his statement to *Thoroughgood's case*, 9 Coke, 137 *a*, reported in volume 5, at page 241 of the London edition of Coke's reports, 1826.

The writing in that case was a deed conveying lands, but [364] cases are referred to in the report where bonds were thus delivered, and it was held that no condition could be attached to a delivery to a party. I have already stated, in reviewing the English cases, that the rule was not founded upon the presence of a seal, but because the delivery could not be contradicted by parol evidence of a condition attached thereto. Those old English cases have been passed over and substantially overruled by the English courts, so far as to hold that the delivery even of a sealed instrument to a party could be made conditionally. And the case of *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543, shows that a bond could be delivered conditionally to a party.

In *Cocks* v. *Barker*, 49 N. Y. 107, parol evidence was admitted to show that the bond was delivered conditionally, and the trial court found against that fact. In this court it was stated that the evidence was not admissible, because a deed could not be delivered to a party upon condition, citing *Worrall* v. *Munn*, 5 N. Y. 229; 55 Am. Dec. 330; and *Gilbert* v. *North American Fire Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543. It was not necessary to the decision, and I think the doctrine that a bond could not thus be delivered is not borne out by the cases in this state, and certainly not by the later cases in England already cited.

But a bond imports the existence of a seal, and the latter is requisite to the legal existence of a bond.

The instrument in this case was an ordinary agreement, not requiring a seal for its validity, and we think the rule as to sealed instruments, however far it may be carried in regard to such instruments as require a seal for their validity, should not be extended in any event to those cases where the instrument is in law not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity.

I think myself the rule should not extend beyond what seems to be the settled law in this state in regard to deeds or writings conveying or relating to the conveyance of real estate, or some interest therein, but in this case it is not necessary

to now go further than to hold the rule inapplicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, the seal being in such case and for this purpose regarded as surplusage, and the instrument should be held to come within the rule laid down in *Reynolds* v. *Robinson*, 110 N. Y. 654, already cited.

The other cases cited in plaintiff's brief have been examined. With the exception of *Van Bokkelen* v. *Taylor*, 62 N. Y. 105, they hold simply that parol evidence of a contemporaneous parol agreement, outside of, and varying the terms of, a written contract, is not admissible. We do not hold the contrary, but simply hold the parol evidence of an agreement that the writing should not take effect upon delivery until the happening of some condition is admissible in such a case as this. *Van Bokkelen* v. *Taylor*, 62 N. Y. 105, was a case of a composition release by creditors of a common debtor, and it was held that evidence of a secret condition attached to the execution or delivery of the release by one of the creditors was inadmissible, as such an agreement in regard to a composition release was void in any event. The case does not touch the question here involved.

We have looked through the other exceptions set forth in this record, and find none that calls upon us to reverse the judgment, and it should therefore be affirmed, with costs.

All concur.

Judgment affirmed.

CONTRACTS—DELIVERY IN ESCROW.—A written contract may be delivered upon condition, but it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled: *McFarland* v. *Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111, and note; *Biederman* v. *O'Conner*, 117 Ill. 493; 57 Am. Rep. 876; *Chipman* v. *Tucker*, 38 Wis. 43; 20 Am. Rep. 1. To the same effect see *Crawford* v. *Foster*, 6 Ga. 202, 50 Am. Dec. 327, the case of a bond; and the failure of such a condition may be proved by parol evidence: *Gregory* v. *Littlejohn*, 25 Neb. 368. Promissory notes may be delivered as escrows, to take effect upon the happening of a certain event to be proved by parol, but such proof must not vary the terms of the note: *Foy* v. *Blackstone*, 31 Ill. 538; 83 Am. Dec. 246, and note. See, also, the note to *Miller* v. *Sears*, 25 Am. St. Rep. 178.

HANOVER NATIONAL BANK *v.* BLAKE.

[142 NEW YORK, 404.]

IF A COMPOSITION AGREEMENT is made between a debtor and his creditors, any agreement made or security taken for an amount beyond the composition, or even for that sum, better than that which is common to all, if unknown to the other creditors, is inoperative and void. The law will set aside and disregard all secret terms made by a creditor with the debtor more favorable to the former than is allowed the other creditors.

COMPOSITION AGREEMENT, FRAUD DOES NOT WHOLLY AVOID.—If a composition agreement is entered into between a debtor and his creditors, and one of them makes with him some extrinsic secret agreement to secure an advantage over the others, this latter agreement is void, and must be disregarded, but its existence does not avoid the composition agreement so as to disentitle such creditor to recover whatever is due to him thereunder.

Thomas S. Moore, for the appellant.

C. Bainbridge Smith, for the respondent.

406 GRAY, J. In the general term opinion the question of law was stated thus: "Did the secret agreement, by which Mrs. Blake indorsed the first two notes, invalidate the whole composition agreement, so that notes given in pursuance of 407 its terms are not enforceable by the plaintiff?" The learned justices, finding no controlling authority in this state, determined the question adversely to the plaintiff and upon the ground, in substance, that, as the agreement was fraudulent, the fraud permeated and vitiated the whole composition agreement, and disabled the creditor from recovering any thing under it. In this view we are not able to agree with them. It may be true that there was no decision in the courts of this state in its features so precisely in point as to compel adherence to its authority, and it is true that the view of the general term has support in decisions of English courts. I think, however, that in our state there are expressions of opinion by eminent judges of this court and by a former very distinguished judge of the superior court of the city of New York, which rather commit us to a contrary view, and which should commend themselves to us as furnishing a wise and more politic rule in these cases of compositions by an insolvent debtor with his creditors. The general principle has been long settled in England and here that a secret agreement, which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over

the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality; and that equality would be destroyed, if the secret agreement were given effect. In *Leicester* v. *Rose*, 4 East, 372, 381, Lord Ellenborough observed that the principle of all the cases was "that where the creditors in general have bargained for an equality of benefit and mutuality of security it shall not be competent for one of them to secure any partial benefit or security to himself." In *Russell* v. *Rogers*, 10 Wend. 474–479, 25 Am. Dec. 574, Justice (afterwards Chief Justice) Nelson said: "So scrupulous are courts in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if [406] unknown to the other creditors, is void and inoperative." It is in the extent of the operation of the principle, which was thus early asserted, that we will find the divergence of judicial opinions between English judges and those of this state. It is curious to observe that though *Leicester* v. *Rose*, 4 East, 372, was relied upon as the basis of authority for their conclusions, the application of the doctrine of that case has been different in each country: *Leicester* v. *Rose*, 4 East, 372, was decided in 1803. Its facts were that several creditors of the insolvent refused to sign, unless collateral security, which was to be given for the first two installments of the composition payment, should also be given for the last two. The defendant agreed to procure this additional security, and, not having done so, the action was brought to enforce his agreement. Lord Ellenborough stated the question to be, whether any legal effect could be given to such an agreement, which gave to some creditors a better security than to others, and he held that it could not, as it was a fraud upon the rest of the creditors. The case of *Howden* v. *Haigh*, 11 Ad. & E. 1033, was decided in 1840, and was a suit upon composition notes. By a secret agreement between the plaintiff and defendant that the latter should indorse to him a bill, accepted by a third party, in order to give him a preference beyond the other creditors, the former had been induced to sign the composition deed. It was held that he could not recover. Lord Denman, relying upon *Leicester* v. *Rose*, 4 East, 372, and *Knight* v. *Hunt*, 5 Bing. 432, held

that every part of the transaction was avoided by reason of the deceit upon the other creditors. Littledale, J., while agreeing with him that the fraud extended over the whole, remarked, rather significantly, "it is possible that the plaintiff may be entitled to sue for the original debt." The case of *Knight* v. *Hunt*, 5 Bing. 432, referred to by Lord Denman, if we are to regard the language of the opinion, did not expressly decide that the whole transaction was avoided. In that case the plaintiff had refused to accede to a composition of ten shillings in the pound, until a brother of the debtor agreed to supply him with coals to an amount in value equal to half the debt. The coals were furnished; [400] but the notes remained unpaid and the plaintiff brought this suit upon them. Best, C. J., stated the principle that the judgment of the creditors is influenced by the supposition that all are to suffer in the same proportion, and briefly concluded with the remark: "Here the plaintiff has had his ten shillings in the pound in coal, and he cannot have it again in money." In *Mallalieu* v. *Hodgson*, 16 Ad. & E., N. S., 689, decided in 1851, Erle J., held that "where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void, not only can he take no advantage from it, but he is also to lose the benefit of the composition." In this ruling he relied upon *Leicester* v. *Rose*, 4 East, 372, and *Howden* v. *Haigh*, 11 Ad. & E. 1033. The plaintiff there was seeking to recover for the balance of his original debt, after allowing for the amount of the composition and the value of a preference. It was his claim that the composition deed had not released the debt to him; because he had been induced to believe that he alone was preferred, whereas some other creditors had also been secretly preferred. It will be observed that in *Mallalieu* v. *Hodgson*, 16 Ad. & E., N. S., 689, it was unnecessary to decide whether the plaintiff had lost the benefit of the composition. The question was whether the plaintiff could defeat the effect of the composition agreement, by the plea that he had been deceived into supposing that he was the only creditor secretly preferred. As an expression of judicial opinion, it must, however, be accorded its weight as evidencing the continuance of the authority of *Howden* v. *Haigh*, 11 Ad. & E. 1033. That case furnishes the sole basis of authority, on which subsequent decisions and text-writers

have rested the doctrine that the fraud in the secret agreement with the creditor so vitiates the whole transaction of composition as to disable him from recovering even the amount of the composition: Leake on Contracts, 768; Chitty on Contracts, 694; Wald's Pollock on Contracts, 239. I say the sole authority, because *Leicester* v. *Rose*, 4 East, 372, did not go so far as that, and *Howden* v. *Haigh*, 11 Ad. & E. 1033, was an extension of the principle, which was supposed to be justified by Lord Ellenborough's [410] decision in the former case. The doctrine of *Howden* v. *Haigh*, 11 Ad. & E. 1033, it may be observed, did not go wholly unquestioned in England, as may be inferred from the remarks of Littledale, J., in that case, which I have quoted, and of Baron Alderson in *Davidson* v. *McGregor*, 8 Mees. & W. 763, who said he was "alarmed at the extent to which that decision goes."

In this state, with the case of *Leicester* v. *Rose*, 4 East, 372, before him, Judge Duer, in *Breck* v. *Cole*, 4 Sand. 79, formed quite a different conclusion as to the extent of the effect of a secret agreement, which attempts to secure to a creditor an advantage over the other creditors. *Breck* v. *Cole*, 4 Sand. 79, was an action upon a promissory note; secretly given to the plaintiff, in addition to the composition notes, as an inducement to him to agree to the composition. Judge Duer in his opinion comments upon the fraudulent nature of the agreement, in its effect upon the other creditors; observing that "it is in all cases the concealment of a fact which it was material for them to know, and the knowledge of which might have prevented them from assenting to the composition. Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum, or the security, which the deed stipulates to be paid and given and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." The learned judge then adverts to the violation of the equality among creditors worked by secretly giving additional security, and states this conclusion: "Hence, either the composition deed itself, ... or the private agreement which seeks to evade, and if valid, would defeat it, must be set aside, and sound policy and the principles of good faith require that the latter course should be followed. It is perfectly just that

every creditor who signs a composition deed should be estopped from setting up any private agreement repugnant to its terms or inconsistent with its intention and spirit, and [411] every private agreement is of this character, and consequently, ... every security, which is the fruit of such an agreement, is illegal and void." He reviews the early decisions in the courts of England and of this state, and concludes that "it is the clear and inevitable result of the decisions that where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void as a fraud upon the creditors from whom it is concealed." The importance of this expression of judicial opinion should not, in my judgment, be underestimated. It was delivered by one of the most eminent judges in this state, and was concurred in by his associates, Judges Mason and Campbell. It does not appear from the opinion that *Howden* v. *Haigh*, 11 Ad. & E. 1033, was before him; although it had been decided ten years before. But whether his attention was called to it or not, the learned judge's opinion was formed after considering the same early English cases as were considered by Lord Denman in *Howden* v. *Haigh*, 11 Ad. & E. 1033, and by Justice Erle in *Mallalieu* v. *Hodgson*, 16 Ad. & E., N. S., 689. Judge Duer limited the effect of the fraudulent secret agreement to the nullification of any rights or advantages, attempted to be gained under it, and regarded it as something quite separable from the composition agreement itself. From all the early cases in England and in this state the inference from the decisions is, not that the composition agreement is avoided, but, as Justice Nelson stated it in *Russell* v. *Rogers*, 10 Wend. 474–479, 25 Am. Dec. 574, "the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, ... is void and inoperative." So in *Fellows* v. *Stevens*, 24 Wend. 294, Justice Cowen held that the law would set aside "all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors." It is the secret agreement itself which is fraudulent and void: *Bliss* v. *Matteson*, 45 N. Y. 22; *Harloe* v. *Foster*, 53 N. Y. 385. And that is all that I think *Leicester* v. *Rose*, 4 East, 372, decided. *White* v. *Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, is one of the latest cases in [412] which this court has considered the effect of composition agreements. In that case the

plaintiff had signed a composition agreement, by which he agreed with other creditors of the debtors to accept one-third of the indebtedness due them in four notes, to be indorsed by the father of the debtors. To induce the plaintiff to sign this agreement, Kuntz, the father of the debtors, secretly agreed to purchase of him the composition notes within a specified time and to pay ten thousand dollars, the composition notes aggregating only about six thousand dollars. This secret agreement Kuntz refused to perform, alleging that it was null and void. Thereupon plaintiff brought an action, alleging these facts in his complaint, and also that several other creditors had been induced to sign by a secret agreement to pay them a larger percentage than the one-third provided for in the composition agreement, and, upon the ground that that agreement was void as to him, demanded its cancellation and that of the notes delivered under it, and a judgment against the debtors for the amount of the original indebtedness. Demurrer to the complaint was sustained below, and in this court the judgment was sustained. It was held that the agreement between plaintiff and Kuntz, the debtor's father, was fraudulent, and could not be enforced, and that the composition agreement as to all the innocent parties was avoided. As the plaintiff was not an innocent party, but had, himself, taken a fraudulent advantage, he could not set up the fraud of the creditors. The opinion discusses what were his rights. It was said that he had not forfeited all claims upon his debtors; that "he must have either the composition notes, or his original notes"; that he could not avoid the composition agreement as to himself and enforce his original notes for their full amount, as that would unjustly result in an advantage over the other creditors, and "he should be held to the composition." "His only remedy," it was said, "against the defendants is upon the composition notes."

Judge Earl, in delivering the opinion in *White* v. *Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, cited the English case of *Mallalieu* v. *Hodgson*, 16 Ad. & E., N. S., 689, as an authority in point; but that he did not adopt the opinion [413] in all its expressions is evident; for he held that there was "no ground upon which he" (the creditor in the case before him) "can be deprived of all remedy."

It is very plain from the opinion in *White* v. *Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, that it is the secret agreement,

by which the creditor receives an undue advantage, which is deemed to be avoided. It was so considered again by Judge Andrews, in *Meyer* v. *Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500, who, referring to *White* v. *Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, as authority for the statement that a collateral agreement is void in composition cases, which secures to one creditor an advantage over others, said "the court refuses to enforce the secret bargain, and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept." In *Solinger* v. *Earle*, 82 N. Y. 393, the facts were that a third party had given his note for a portion of the insolvent's debt to the defendants, to induce them to agree to the composition. Having paid the note to a transferee thereof, he brought an action to recover back from the defendants the money so paid. It was held that the action could not be maintained; for, though the transaction was a fraud upon the other creditors, the parties were *in pari delicto*. Judge Andrews, remarking that fair dealing condemned such a transaction, said: "If the defendants here were plaintiffs seeking to enforce the note it is clear that they could not recover." Inasmuch as the note sued upon was for an additional amount beyond the amount of the composition agreement, the remark of the learned judge was in line with all the authorities. He held the secret agreement was void and could not have been enforced. The case is in no wise in conflict with *White* v. *Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886, or *Meyer* v. *Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500.

If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt; [414] a view which Littledale, J., regarded as probable in *Howden* v. *Haigh*, 11 Ad. & E. 1033.

It would certainly seem to be the logical outcome of the proposition asserted below that if the composition agreement has been avoided it has become inoperative as an agreement for any purpose. We assert a wholesome rule and one which works a just result, if we hold that the secret and fraudulent agreement itself is illegal, and is inoperative to confer any

rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition; though it has support in some of the English cases referred to. It seems to me the case falls easily within the rule, which permits a severance of the illegal from the legal part of the covenant: *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 Com. P. 235, 250; *United States* v. *Bradley*, 10 Pet. 343–360.

In *Mallan* v. *May*, 11 Mees. & W. 653, the plaintiffs, who were surgeon dentists, agreed to take the defendant as an assistant and to instruct him for a term of years, and he agreed at the expiration of that term not to practice his profession "in London or any of the towns in, or places in, England or Scotland, where the plaintiffs might have been practicing." It was held that the covenant as to not practicing in London was valid, and that not to practice elsewhere was illegal; but that the valid part was not affected by the illegality of the other part. Here the agreement with other creditors for a composition was lawful and valid (unless they should elect to rescind it upon the discovery of the secret agreement, an element not present); but the agreement for, and the giving of, additional security was unlawful and void. Is there any reason why the bad may not be rejected and the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiff's original demand, or that it shall fall and leave the plaintiff at liberty to recover the original debt, I [415] am for upholding it, and I fail to see why the legal part of the transactions had with it cannot be severed from the illegal part. We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory they may not so elect, and may rely that the

creditor, secretly seeking to obtain some promise of advantage over them, will be prevented from enforcing it and from gaining any thing by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation, which, from its inception, was unlawful and which the law annuls: *Bliss* v. *Matteson*, 45 N. Y. 22. It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain, there would be an inducement to an unscrupulous creditor to commit a fraud; for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent that may be true; but, on the other hand, it may be suggested that, if it were the rule, the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement, and thus, by trick and device, to leave them wholly remediless; disabled to recover the amount of the composition, and disabled from pursuing the original debt which the composition agreement released. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it [416] with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement. The conclusion reached is the result of a careful examination of the authorities and the doctrine they teach, and it is in accord with a wiser policy. It must not be forgotten that the defendant's contract of indorsement is within the terms of the composition agreement, with respect to the note in suit. We know nothing of the fate of the earlier notes; the indorsement upon which by defendant was secretly and fraudulently procured to be added. She had a perfect defense to the enforcement of her contract. We are only concerned now with the question of whether the plaintiff shall have the amount of the composition; notwithstanding it may have been agreed secretly that it should have some better security for the payment of some of the composition installments. This question, for the reasons stated, should be answered in the affirmative, and, therefore, the judgments below should be reversed and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS, C. J., and PECKHAM, J., dissenting.

Judgments reversed.

DEBTOR AND CREDITOR — COMPOSITIONS — SECRET PREFERENCES. — An agreement in favor of a creditor who has united in a composition deed, whereby he is to obtain any advantage over the other creditors, to which they did not assent, is void: *White* v. *Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886, and note; *Ramsdell* v. *Edgarton*, 8 Met. 227; 41 Am. Dec. 503; but see *O'Shea* v. *Collier etc. Oil Co.*, 42 Mo. 397; 97 Am. Dec. 332, and note.

DEBTOR AND CREDITOR—COMPOSITION—WHAT AVOIDS.—A composition is not avoided by reason of any unfair preference obtained by one creditor through a secret agreement with the debtor: *Page* v. *Carter*, 16 N. H. 524; 41 Am. Dec. 726, and note. For the contrary doctrine, see *Kullman* v. *Greenebaum*, 92 Cal. 403; 27 Am. St. Rep. 150, and note, and *Bank* v. *Hoeber*, 86 Mo. 37; 57 Am. Rep. 359, and extended note. See, also, the note to *Hempstead* v. *Johnson*, 65 Am. Dec. 474.

HANKINS *v.* NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY.

[142 NEW YORK, 416.]

MASTER AND SERVANT—FELLOW-SERVANTS.—To his servant a master is liable for negligence in respect to those acts or duties he is required to perform as master, without regard to the rank or title of the agent to whom he has intrusted the performance of such duties or acts.

MASTER AND SERVANT.—THE LIABILITY OF A MASTER for the negligence of his servant, whereby another servant is injured, does not depend upon the doctrine of *respondeat superior*, but upon the omission of some duty of the master which is deputed to such inferior employee. If the act omitted is one of the kind which the master owes to his employee the duty of performing, he is responsible to the employee for the manner of its performance. It is not a question of rank among the different employees.

MASTER AND SERVANT — RAILWAYS. — IF A TRAIN-DISPATCHER originates and promulgates orders for the running of trains without regard to their ordinary time-tables, and when each is approaching the other in entire ignorance of the other's whereabouts, he is acting as a master, and therefore the master is liable for the negligence of the dispatcher.

A MASTER CANNOT BY ADOPTING RULES AND REGULATIONS for the proper performance by his agents of an act or duty resting upon such master exonerate himself from liability for the negligence of such agent in such performance.

RAILWAY CORPORATIONS — TRAIN DISPATCHERS, LIABILITY FOR. — A train-dispatcher in the dispatch of trains performs for the master a duty which he owes as such, and the master is therefore answerable to a fireman injured by the collision of two trains in consequence of their obedience to orders negligently promulgated by such dispatcher. Such fireman and the train-dispatcher are not fellow-servants.

ACTION to recover damages to the plaintiff while acting as fireman of the defendant, and resulting from the collision of freight trains.

W. H. Henderson and W. S. Thrasher, for the appellant.

James H. Stevens, for the respondent.

[418] PECKHAM, J. The nonsuit in this case was granted on the ground that, assuming the negligence of the train-dispatcher, the plaintiff cannot recover because it was the negligence of a fellow-workman. Whether the train-dispatcher bore that relation to the plaintiff is in truth the only question in the case.

The facts are not complicated, and those which we regard as material are as follows: The division upon which the accident happened extends from Dunkirk on the west to Hornellsville on the east. The plaintiff was a fireman on a freight train (No. 340), which, on the 19th of October, 1887, had started from Dayton, and arrived at Salamanca, a station on [419] defendant's road, and within the above-named division, early in the morning, on its way east towards Hornellsville; but the train had left Dayton, and arrived at Salamanca, several hours behind its schedule time, and its movements since leaving Dayton had been entirely controlled by special telegraphic orders from the train-dispatcher at his office at Hornellsville.

At 7:57 of the day mentioned the engineer and conductor of this train received while at the Salamanca station an order by telegraph from Hornellsville, and signed by the division superintendent and the train-dispatcher, which order directed them to "meet trains 341, 339, and 349 at Carrollton, ahead of train 348." Carrollton was a station a few miles east of Salamanca. The train consisted of one hundred and thirteen cars and was about half a mile in length, and it started to go east as far as Carrollton under the above order very soon, or within a few moments, after the order was received. The west-bound train No. 341 had arrived at Carrollton several hours behind its regular time, and it was also being run by special telegraphic orders from the train-dispatcher's office at Hornellsville. While at Carrollton on its way west, the conductor and engineer of this train received their telegraphic order at 8:43, A. M., which directed them to "meet train 334 at Carrollton, 348 at Salamanca, not pass Salamanca without orders." It was the duty of the conductor and engineer of

this train, upon receipt of the order, to move their train west to Salamanca. This they at once proceeded to do.

Neither the engineer nor the conductor has any voice in running a train by special order; they are simply charged with the duty of carrying out the orders that come to them from the train-dispatcher's office. These orders to the conductors and engineers of the trains Nos. 340 and 341 were at once attempted to be carried out by them, and in consequence thereof the two trains came into collision not far from Carrollton and between 9:05 and 9:10 A. M.

The plaintiff was fearfully injured, his leg being almost torn from his body, and he pinned down between the engine and tender and very badly scalded by the hot water from the
420 boiler of his engine. Amputation near the thigh was soon after performed, and the plaintiff, as might be assumed, suffered great agony from the injury, and is rendered a maimed and wrecked individual for the balance of his life. There is no question of contributory negligence in the case, and it cannot be contended that the plaintiff was at the time of the accident engaged in any thing other than an honest and careful performance of his duty. If these orders were negligently given, the sole question as to defendant's liability becomes one of law. There was enough evidence as to negligence on the part of the train-dispatcher in the giving of the orders to require the submission of the question to the jury, provided the defendant ought to be held liable for his negligence. It frequently becomes very difficult to determine whether the particular act in any case is that of the master in his character as such, or is only that of a mere fellow-servant. It is not a question as to the rank of the individual who gives the order or performs the act. The question is one as to the character of the order or act, whether it is one which is given or performed as an order or act of the master in his character as such, or only as an order or act delegated by the master to another and performed by such other as an employee. The rule as to the liability of the master for the act of a servant is well known. Church, C. J., said in the Flike case that the master must be held liable for negligence in respect to such acts or duties as he is required to perform as master, and without regard to the rank or title of the agent whom he has intrusted with its performance: *Flike* v. *Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545. This language was repeated in *Crispin* v. *Babbitt*, 81 N. Y. 516, 37

Am. Rep. 521, where the liability of the master for the negligence of his servant, by which another servant has suffered injury, was said not to depend upon the doctrine *respondeat superior*, but upon the omission of some duty of the master which he has confided to such inferior employee. If the act omitted were of the kind which the master owed to the employee the duty of performing, he would be responsible to the employee for the manner of its performance. [421] It is not a question of rank among the different employees. The rule thus laid down has been since frequently approved in this court: *Slater* v. *Jewett*, 85 N. Y. 62; 39 Am. Rep. 627; *Cullen* v. *Norton*, 126 N. Y. 1. Its application to a particular case is sometimes difficult, and the boundary line between an act of the master and an act of the employee is sometimes quite vague and shadowy. In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road, and its furnishing general time-tables pertaining thereto. Whether the train-dispatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that if the train-dispatcher had obeyed the rules the accident would not have occurred. If the defendant owed a duty as master to give correct orders to these trains, or, at least, to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he intrusted the performance of the duty to the train-dispatcher.

These trains were being run without regard to their ordinary time-tables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other's whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in *Slater* v. *Jewett*, 85 N. Y. 62, 39 Am. Rep. 627, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road, but when a variation, or, in other words, when a special time-table is made out for two trains, by which they are to run, it is the duty of the master not alone to take reasonable care

that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered and by which the trains are run shall not [423] necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary and is the duty of the master. When the train-dispatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his, the master's, particular work.

In this case it appears that the train-dispatcher had his office at Hornellsville for the whole division, and that while he used the name of the division superintendent in giving orders for the movement of trains, yet by the rules they were essentially his orders and signed with his initials in addition to those of the superintendent. It is not claimed that the division superintendent was even bound to know about these movements or special orders. There were three dispatchers at Hornellsville, but there was only one man at a time on duty, and his duty was for eight hours, and while on duty, by a rule of the company, no order could be issued by any other dispatcher. In this way provision was made for full knowledge by each dispatcher of every thing going on on his division as to the movement of trains during the time when he was on duty. It is said the accident resulted from a disobedience of these rules, in that the dispatcher, who was about to relinquish his post, sent, at the request of his successor and in his name, the order to the east-bound train at Salamanca, and the successor, forgetting the transmission of such order at his request by the preceding dispatcher, gave the order to the train at Carrollton, and bound west, which caused it to move forward and encounter the other train.

If the successor of the train-dispatcher, instead of asking the one who was just off duty to send the order to the Salamanca train, had sent it himself, as the rule required, all that can be said is that there might have been more probability of his remembering it, but it cannot be said that his failure to obey the rule in such case was the cause of the accident. The same want of memory might have existed in either case. I do [423] not, however, lay any weight upon this fact, because, whether the train-dispatcher did or did not obey a rule of the defendant, he was acting when the orders were given on this

subject as the master, and was discharging the master's duties, and if he negligently performed them the master must be held liable therefor. We do not say this duty went further than to use reasonable care, measured by the gravity of the interests at stake, to give originally correct orders. If they were correct, as originally given, and subsequently, through the negligence of some employee, they were incorrectly interpreted, or copied, or mistakenly repeated, or delivered to the wrong person, in these and in many other supposable cases there might, perhaps, be reason for the application of the doctrine as to negligence of a co-employee. It is not so as the case appears here.

In *Flike* v. *Boston etc. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545, the accident happened because of the absence of a third brakeman on a train sent out from East Albany. The company had provided a man at that station called a head conductor, whose duty it was to make up the trains, and hire and station the brakemen, and, on account of one of the brakemen oversleeping himself, the train went out without a sufficient number of brakemen. The court held the company had not discharged its duty to send out only a properly equipped train, when it provided a head conductor and made rules for his presence there, and gave to him a superintendence over the trains. The defendant owed a duty to the employees to send out only such a train, and that duty was not complied with by adopting rules governing such a case. It is also the duty of the company to use care in the furnishing of proper cars and machinery, but the duty is not performed by adopting a rule providing for proper inspection and in furnishing proper persons to perform such inspection, so long as they negligently omit to inspect. Proper inspection of the equipment and machinery of a train is itself part of the duty of the company: *Bailey* v. *Rome etc. R. R. Co.*, 139 N. Y. 302.

These cases make it plain that whenever the act is that of the master, or the duty to be performed is particularly his [424] duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master.

Nor is the holding that a train-dispatcher in the dispatch of trains performs for the master a duty which it owes as such, a new departure in the branch of the law under discussion. While the cases cited below do not necessarily proceed

upon that basis, yet it is plain that it was in all of them regarded as an indisputable proposition so far as a train-dispatcher acted in ordering the movement of trains. In *Slater* v. *Jewett*, 85 N. Y. 66, 70, 71, 39 Am. Rep. 627, it was assumed that the order of the train-dispatcher was the act of the master, but it was held that the order was, in fact, correct, and the injury happened from a negligent performance of duty by subordinate servants who were co-employees of plaintiff's intestate. The same holds true in the case of *Sheehan* v. *New York Cent. etc. R. R. Co.*, 91 N. Y. 332, 337, and Judge Danforth there says that no servant takes the risk of an injury by the very act of the master himself. In *Dana* v. *New York Cent. etc. R. R. Co.*, 92 N. Y. 639, a judgment of nonsuit in an action brought to recover damages for an injury received in the same accident in which Sheehan was injured was reversed in this court, and upon the same reasoning employed in the Sheehan case. And in *Sutherland* v. *Troy & Boston R. R. Co.*, 125 N. Y. 737, more fully in 35 N. Y. St. Reporter, 853, this court assumes in the opinion there delivered that if the accident occurred from the omission of the train dispatcher at Troy to exercise proper care to notify the train, a case was made out on the question of defendant's negligence.

I think this is a fair and wholesome rule, fair to the master, while at the same time affording some protection to the employee. The defendant ought not to escape liability for negligently issuing as master, and in the course of the performance of its duty as such to its employees, an improper order, and whether it has done so should be submitted to the jury.

I have looked at the various cases cited by the learned [425] counsel for the defendant, and I have found none in this court which conflicts with these views. It is not necessary to cite each one and criticise it in detail. It is sufficient to say they do not conflict with our decision in the case at bar.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except GRAY, J., not voting.

Judgment reversed.

MASTER AND SERVANT—FELLOW-SERVANTS.—The liability of a master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee whose negligence caused it: *Ell* v. *Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep.

621, and note; *McElligott* v. *Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Georgia Pac. Ry. Co.* v. *Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Lewis* v. *Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631, and note. A corporation is liable for negligence in respect to such acts and duties as it is required to perform as master without regard to the rank or title of the agent intrusted with their performance: *Flike* v. *Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545.

MASTER AND SERVANT—VICE-PRINCIPAL—LIABILITY FOR.—For the breach of a duty which a master so owes to a servant that he must perform it in person or by a superior servant employed for that purpose, the master is responsible to a servant injured thereby without contributory negligence, and where the breach of duty is by such superior servant, it does not matter what his rank is: *Daniels* v. *Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870, and note; *Elledge* v. *National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290, and note. If an act is one pertaining to a personal duty that the master owes to his servants, he is responsible to them for the manner of its performance, by whomsoever performed: *Ell* v. *Northern Pac. R. R. Co.*, 1 N. Dak. 336; 26 Am. St. Rep. 621, and note; *McElligott* v. *Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Galveston etc. Ry. Co.* v. *Smith*, 76 Tex. 611; 18 Am. St. Rep. 78; *Bushby* v. *New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844.

RAILROADS—TRAIN DISPATCHERS AS FELLOW-SERVANTS WITH TRAINMEN. The following cases hold that train-dispatchers and trainmen are not fellow-servants: *Lewis* v. *Seifert*, 116 Pa. St. 628; 2 Am St. Rep. 631; *Smith* v. *Wabash etc. Ry. Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Darrigan* v. *New York etc. R. R. Co.*, 52 Conn. 285; 52 Am. Rep. 590. See, also, the extended note to *Adams* v. *Iron Cliffs Co.*, 18 Am. St. Rep. 455, 456.

KEASBEY *v.* BROOKLYN CHEMICAL WORKS.

[142 NEW YORK, 467.]

TRADEMARKS.—THE WORDS "BROMO-CAFFEINE," applied to a medicinal preparation, constitute a valid trademark, though before their use as such the same words were employed to designate a chemical compound having no identity of substance or of nature with the medicinal preparation, if the words as used as a trademark do not describe the article or its ingredients and had never been used in medical science to designate any other medicine or medical preparation.

TRADEMARKS.—WORDS MAY BE PROTECTED AS A TRADEMARK THOUGH they suggest more or less the quality or characteristics of the article, if they were not in common use when first applied as such mark, and did not indicate the chief ingredients of the article.

William G. Choate, for the appellants.

Herman Aaron, for the respondent.

470 PECKHAM, J. This action was tried by the court without a jury, and judgment was given in plaintiff's favor, enjoining the defendants from the use of the words "Bromo-

Caffeine" upon bottles containing a substance similar to that sold by the plaintiffs under that name. The injunction was granted on the ground that the defendants by such use of the above words infringed upon and violated the legal rights which the plaintiffs had acquired in the exclusive use of those words for the purposes of a trademark.

The general term of the supreme court reversed the judgment, and granted a new trial, holding that the plaintiffs had established no legal right to the exclusive use of the words. It does not appear in the order of reversal that the general term reversed the judgment upon any question of fact, and it must, therefore, be presumed that it was not reversed upon any such question: Code Civ. Proc., sec. 1338. If there be any evidence to sustain the findings of fact by the court, those findings are conclusive upon us, and the only question remaining would be whether those facts sustained the conclusions of law based upon them. The plaintiffs are manufacturers of chemical and also of medicinal preparations. In 1873 they began the manufacture of caffeine preparations, and they say that they practically created the demand in medicine for them in this country. They testified that they [471] had been annoyed by having other manufacturers make similar preparations, and sell them for those prepared by the plaintiffs, and so they devised their last preparation, and affixed labels to the bottles containing it, on which were printed the words "Bromo-Caffeine," and the plaintiffs also complied with the law providing for registering labels as trademarks in the patent office at Washington. This use of the above words was commenced in the year 1881 by plaintiffs, and they have spent between three and four hundred thousand dollars in advertising their trade in the preparation thus sold. Notwithstanding this enormous expense thus incurred by plaintiffs, their claim to the exclusive use of the words as a trademark is denied by defendants, because, as they allege, the words used for that purpose were in common use at the time of their adoption by plaintiffs, and it is maintained that they indicate the character, quality, and composition of the preparation made by plaintiffs, and that they correctly describe an article of trade, so that its qualities, ingredients, and characteristics would be recognized upon seeing or hearing the words.

The defendants urge that this case comes within the principles laid down in *Caswell* v. *Davis*, 58 N. Y. 223, 17 Am. Rep. 233, while the plaintiffs claim that it is like those cases

where the trademark, while more or less suggestive of the ingredients, characteristics, or composition of the article to which it was applied, yet did not define the facts to such an extent as to thereby forfeit protection for the exclusive use of the words as a trademark for the particular article manufactured.

Before proceeding with the question further it will be well to see exactly what facts have been found by the trial court. It has been found that the manufacture of chemicals and of medicinal preparations are separate and distinct industries. In 1881 the plaintiffs commenced, and have ever since continued, the manufacture of a secret preparation of caffeine, composed of certain ingredients specially set out in the findings. This is a medical preparation, and made for and adapted to the relief of headaches and other nervous disorders. In order to distinguish the preparation from all others, and to establish a [472] trademark, the plaintiffs designated and applied to the preparation a new, arbitrary, and fanciful name, which does not describe the article or its ingredients, the name being "Bromo-Caffeine," which name had never been before used in medical science to designate any other medicine or medicinal preparation, and which name the plaintiffs thereupon applied to, and have since used for, the preparation sold by them, and such preparation, by the name thus adopted and used, has become widely known as the preparation of the plaintiffs, and as designating their manufacture, and the preparation has acquired a large and extensive sale in the United States and other countries, and large sums of money have been expended by the plaintiffs in advertising and introducing into the market this preparation.

In the year 1890 the defendants made a preparation similar to that of the plaintiffs, and intended for the same purpose, to which they applied the name of "Bromide-Caffeine," and subsequently they changed it to the name of "Bromo-Caffeine," and this name the defendants are still using to designate their preparation. It was further found that in the year 1867 a German chemist made a compound, and called the same "Bromo-Caffeine," and an account of the making of the compound, including the process of making it, was published in a chemical journal at Leipsic in 1868. The formula is also to be found as published in Watt's Dictionary of Chemistry, edition of 1872, and the article is called therein "Bromo-Caffeine." This chemical compound contains one portion of

bromine, which is a virulent poison, and it is mixed in certain proportions with carbon, hydrogen, nitrogen, and oxygen, and the result is that the caffeine entirely disappears. The evidence shows that the chemical compound thus described has no caffeine, but has bromine in it, and it is not an article of commerce, nor is it generally known, and it is useless and valueless and unemployed, and outside the knowledge of expert or practical chemists. It is a mere curiosity of a chemical, and not of a medicinal, nature. While in the chemical compound the caffeine has wholly disappeared, and one atom of bromine [478] has replaced one atom of hydrogen, the medical compound, on the other hand, as prepared by the plaintiffs, contains no bromine at all, and does contain caffeine and bromide of potassium, and several other substances. Thus, there is no identity of substance or of nature between the "Bromo-Caffeine" of chemistry and the "Bromo-Caffeine" prepared as a medicine by the plaintiffs. The former is a worthless chemical compound, while the latter is a valuable medicine. Bromine enters into combination with many different alkalies, and when thus combined with an alkali it becomes a bromide of such alkali; thus, when compounded with potassium in certain proportions it is called bromide of potassium, and when with sodium it is called bromide of sodium; and so there are other organic compounds into which bromine enters besides what are termed alkalies, probably hundreds of them. The term "Bromo-Caffeine," therefore, cannot be said to indicate the presence of bromine in the plaintiffs' preparation, because, in truth, there is no free bromine in it, while it is equally useless for indicating the particular alkali with which the bromine has in the particular preparation combined, out of twenty or thirty different ones with which bromine will combine, some of which may not even be sedative in their effects. Further than that the words used would not show that there was necessarily any bromide used in the compound, because bromine may enter into organic compounds which are not alkalies; and the term "bromo" does not necessarily distinguish the substance as an alkali with which the original bromine may have combined before it entered into the final preparation compounded.

There is a finding that bromide of potassium and bromide of sodium were both well known to physicians prior to 1881, as possessing certain medical properties as sedatives, and the preparation sold by the plaintiffs contained the former bro-

mide, while that sold by the defendants contained the latter, and both were mingled with caffeine and an effervescent salt and sugar and some other ingredients. The therapeutic effect of both bromides is substantially identical.

I think the finding of the court upon these facts is well [474] grounded when it is said that the plaintiffs originated and applied their preparation to a new, arbitrary, and fanciful name, which does not describe the article or its ingredients, and which had never been used in medical science to designate or name any other medicine or medical preparation. There is evidence which sustains the finding, and on this appeal the finding is conclusive upon us. The trademark does not impart information as to the general characteristics and composition of the plaintiffs' preparation at least to such an extent as to render the trademark itself invalid on that ground. It is not descriptive to any such extent as that. The name may and probably would suggest to any intelligent man a suspicion or perhaps a belief that the article had bromine or a bromide and caffeine in it in some conceivable form, together with possibly many other substances, but there is nothing in the name which necessarily suggests as the basis of this preparation any particular bromide out of the twenty odd which bromine may form with different alkalies, nor would it necessarily suggest that it was a bromide at all, for it might be one of the hundreds of other organic compounds with which bromine combines. Upon these facts how can it be said that by the use of these words there is any such description of the article as indicates to the public the principal ingredient of which the article is composed?

The word "bromo" cannot be claimed as descriptive of the ingredient bromine, because the word is also used with regard to substances which have no bromine in them, but only some one of the different bromides. Neither does the word describe any particular bromide. Neither does it give any clue to the substance other than a bromide with which the bromine may have been compounded. The word fails in fact to give information as to what the ingredient is, further than a possibility as above suggested. This failure is very important, for unless the word give some reasonably accurate, some tolerably distinct, knowledge as to what the ingredient is, it is clear that it is not descriptive within the meaning of that term as used with reference to a trademark. When spoken of with reference [475] to a preparation of which it

forms a part, bromide of potassium is one ingredient, while bromide of sodium is another and a totally different ingredient, although both are substantially identical in their therapeutic effect. They are still and nevertheless distinct and different ingredients. In addition, however, is the fact that the word "bromo" does not particularize sufficiently even to indicate that the ingredient is either one or the other of those two bromides out of the twenty or thirty bromides with which bromine may combine. And there is no finding and no proof that even the therapeutic effect of all the other bromides is either substantially or at all identical each with the other or with the two bromides above mentioned. All that any one could do on reading these words would be to guess that probably the article contained some caffeine and some bromine free or combined with some bromide or else with some other organic compound which bromine will combine with, and as to which of these almost infinite possibilities was the fact, the word "bromo" would convey no information whatever.

The testimony of Dr. Hamilton is not contrary to this statement. He said he did not know the ingredients composing the preparation, but supposed it might contain some preparation of the bromo, but he did not know what it contained. He would understand from the use of the word "bromo" that some form of bromide and caffeine are combined; the phrase "Bromo-Caffeine" vaguely conveyed to his mind that there was some preparation of bromide and caffeine together. The phrase, he said, was a term and not a scientific one, and he could not tell by the word "bromo" what particular substance the bromide had combined with. The evidence shows that the word "bromo" does not necessarily indicate the presence of any bromide. The word is just as descriptive and just as applicable in case bromine itself were the substance combined in the compound and not a bromide at all. The word could only be said to inform one of the fact that bromine or some kind of bromide had entered into and formed part of the compound, but upon the question whether it was [476] bromine or one of the many different kinds of bromides, the word "bromo" would give no knowledge whatever. A name which furnishes no information on this point cannot be said to be so far descriptive in its nature as to prevent its adoption as a trademark so far as this question is concerned.

We think there is a distinction between the facts in this

case and that of *Caswell* v. *Davis*, 58 N. Y. 223, 17 Am. Rep. 233. In this case the term perhaps suggests that some one among the hundreds of substances that bromine may combine with has been used in such combination together with caffeine. There are, however, some seven different ingredients in the plaintiffs' preparation, and there is no free bromine among them, and there is no evidence as to what the substance is which the bromine (if any) had combined with before being used in the preparation, and so it is plain that the words "Bromo-Caffeine" do not in fact describe the ingredients or even give any clear general idea as to what they are.

The plaintiffs adopted the words as a trademark after consultation with counsel, and before the name was in use in the United States as applied to any substance, while in the Caswell case the combined words were not applied to the medicine as a name to designate the ownership, origin, or particular manufacture of the preparation, but solely to indicate to physicians and the community of druggists the names of the three principal ingredients of which it was composed, and these three principal ingredients were known in *materia medica*, and had been prescribed by physicians many years prior to 1860. The words did, in fact, show forth the quality and composition of the article sold. The name adopted was "Ferro-Phosphorated Elixir of Calisaya Bark," and it was said that they did indicate to the medical profession, to the community of druggists, and to the public, the principal ingredients of which the article was composed. It also substantially indicated that the Calisaya bark was treated or had been subjected to the action of the two substances, iron and phosphorus, both of them old and well-known names of articles used in medicine. All through the opinion of Judge [477] Folger it is seen that the idea is prominent that the words did indicate the chief ingredients of the article, and it was only the particular strength of the different substances in their application to the bark that the words did not convey an exact knowledge of. In this case the object was to coin a name which should not be descriptive.

We think this case comes within the doctrine of those cases which have protected the words as a trademark although they suggested more or less the composition, quality, or characteristics of the article. Some of the cases are alluded to in the opinion of Rapallo, J., in *Selchow* v. *Baker*,

93 N. Y. 59, 45 Am. Rep. 169; and the distinction is drawn in *Electro-Silicon Co.* v. *Hazard*, 29 Hun, 369.

Nor do we think the words were in common use when applied by plaintiffs.

They had been used to designate a certain chemical compound as hereinbefore quoted from the findings of the trial judge, but, as stated therein, that compound was not in use and had no known useful quality, and was but a chemical curiosity, and the words had no known significance in the medical world at the time when they were appropriated by the plaintiffs.

We think that there is evidence sufficient in this case to support the findings of fact made by the trial court, and that such findings justify the conclusions of law based upon them.

The defendants should be enjoined from the further use of a name which the plaintiffs had legally appropriated as a trademark many years prior to the time when the defendants commenced its use. We can see no reason for an appropriation of this name by the defendants other than that arising from an effort to convert to their own use and benefit the labor and skill of another. As this name adopted by plaintiffs does not describe the ingredients entering into defendants' preparation, an injunction restraining the latter from the use of the name adopted by the plaintiffs can inflict no injustice upon defendants. And they should not be permitted to acquire any advantage to themselves by the unlicensed use of the plaintiffs' trademark. It could only be used by the defendants for [478] a fraudulent and illegal purpose, and the plaintiffs should be protected from such an improper use.

The order of the general term should be reversed, and the judgment entered upon the decision of the trial judge should be affirmed, with costs in all courts to the plaintiffs.

All concur.

Ordered accordingly.

TRADEMARKS—WHAT WORDS MAY BE ADOPTED AS.—Where a name adopted as a trademark is not generic or descriptive of the article, its quality, or ingredients, but is arbitrary or fanciful, it is entitled to be protected as such: *Waterman* v. *Shipman*, 130 N. Y. 301; *Bolander* v. *Peterson*, 136 Ill. 215; *Solis Cigar Co.* v. *Poso*, 16 Col. 388; 25 Am. St. Rep. 279, and note. An exclusive proprietary interest cannot be acquired in a word which is a generic term and in its nature descriptive of that to which it pertains,

rather than its origin or proprietorship: *Koehler* v. *Sanders*, 122 N. Y. 65; *Laughman's Appeal*, 128 Pa. St. 1; *Aff* v. *Radam*, 77 Tex. 530; 19 Am. St. Rep. 792, and note. Words employed in their ordinary sense will not be protected as a trademark: *Radam* v. *Capital Microbe etc. Co.*, 81 Tex. 122; 26 Am. St. Rep. 783, and note. For a full discussion of this subject, see the monographic note to *Partridge* v. *Menck*, 47 Am. Dec. 284, and the note to *Insurance etc. Tank Co.* v. *Scott*, 39 Am. Rep. 290.

WEAVER *v.* HAVILAND.

[142 NEW YORK, 534.]

STATUTE OF LIMITATIONS.—A JUDGMENT CREDITOR'S CAUSE OF ACTION TO SET ASIDE A TRANSFER AS FRAUDULENT as against him does not accrue until he has recovered judgment, and execution has issued thereon, and been returned unsatisfied. Therefore, until such judgment and return, the statute of limitations applicable to his action does not begin to run.

CREDITOR'S BILL—JUDGMENT, CONCLUSIVENESS OF.—The defendant in a creditor's bill to set aside a transfer made to him for the purpose of defrauding the complainant cannot question the judgment recovered by the latter against the alleged fraudulent grantor in the absence of fraud or collusion.

Backenstose and Keyes, for the appellant.

Reed and Shutt, for the respondent.

536 ANDREWS, C. J. This is a judgment creditor's action, and the only defense relied upon at the trial was the statute of limitations. The action was commenced February 13, 1892. It appears from the pleadings that Phebe Haviland, mother of the defendant, took under the will of her husband, who died September 17, 1878, the use of his real estate and the income of his personal property for life. His real estate consisted of a house and lot in Geneva, in this state, and he held a mortgage on lands in Michigan, executed by Henry S. Weaver and wife. On the thirteenth day of April, 1880, Phebe Haviland, as executor of her husband's will, she then being in the state of Michigan, sold and assigned the mortgage to one Fish for the sum of two thousand six hundred dollars, falsely representing to Fish that that sum was due and unpaid thereon, whereas in fact there was due and unpaid only the sum of two thousand one hundred dollars. Fish, upon ascertaining the fact, commenced an action in the courts of Michigan against Phebe Haviland to recover back the sum paid in excess of the amount due on the mortgage, and on June 9, 1881, recovered a judgment against her in the action.

An action on this judgment was subsequently brought in the supreme court of this state January 28, 1886, and judgment was recovered thereon against Phebe Haviland March 9, 1886, for six hundred and sixty-seven dollars and forty-seven cents, and execution thereon was issued and returned unsatisfied. Phebe Haviland, at the time of the death of her husband and ever thereafter, was a resident of the state of New York. It is found that shortly before the recovery of the Michigan judgment, and on or about June 2, 1881, Phebe Haviland conveyed to the defendant, William W. Haviland, her life estate in the house and lot, and gave to him the moneys received by her from Fish on the transfer of the mortgage, without consideration, and for the purpose of placing her property out of her hands, so that the same could not be reached upon a judgment in the action. Phebe Haviland died intestate August 2, 1888. This action is brought to reach the interest of Phebe [537] Haviland in the property so fraudulently transferred to the defendant. There is another fact disclosed by the evidence as to which there is no finding, but which is deemed important by the counsel for the defendant, viz., that the money paid on the mortgage by Fish was at the time received by the defendant, and was retained by him as his own, with the consent of Phebe Haviland. But if this finding had been made, the evidence would have justified the further finding that the defendant assumed to act in the transaction as the agent of his mother, and that Fish supposed he was so acting, and had no information, until the examination of the defendant in supplementary proceedings shortly before the bringing of this action, that the money had been retained by him.

The limitation of time for bringing actions in the nature of a creditor's bill to set aside a conveyance or transfer made by the judgment debtor in fraud of creditors is prescribed by section 382 of the Code of Civil Procedure. By the fifth subdivision of that section a creditor's action must be commenced within six years "after the cause of action has accrued." Such an action is to procure a judgment "other than for a sum of money on the ground of fraud in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery." The words "other than for a sum of money" in subdivision 5 included those cases in which equitable relief is required, although as part of the ultimate relief a money judgment is also demanded: *Carr* v.

Thompson, 87 N. Y. 160. Unless, therefore, the right of action to set aside the fraudulent transfer from Phebe Haviland to the defendant accrued to the plaintiff more than six years prior to February 13, 1892, the day of the commencement of the action, the action was not barred. The right of Fish to bring an action to set aside the transfer did not accrue until he had recovered a judgment in this state against Phebe Haviland and the return of an execution unsatisfied. Until his claim against Phebe Haviland had ripened into a judgment he stood as a general creditor merely, and was not in a situation to assail the transfer to the defendant. The authorities upon this point are numerous and decisive: *Reubens* v. *Joel*, 13 N. Y. 488; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Geery* v. *Geery*, 63 N. Y. 252; *Adsit* v. *Butler*, 87 N. Y. 585. The time when the fraud was committed is not the period from which the limitation is to be computed, but the time when the plaintiff had acquired a standing to assail it. The present action was commenced within six years after Fish had recovered his judgment here. The defendant, in the absence of fraud or collusion, cannot question the validity of the claim upon which it was rendered, and he acquired no immunity from pursuit because of the time which intervened between the fraudulent transaction and the rendition of the judgment: *Decker* v. *Decker*, 108 N. Y. 128. The clause in subdivision 5, section 382, following the clause above quoted, "the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under which he claims of the facts constituting the fraud," does not help the defendant. This clause was added to enlarge the time for bringing the action beyond the six years in the case specified. It was not intended to make the date of the discovery of the fraud the time of the accruing of the right of action in cases where the fraud was known, but the plaintiff had not established his claim by judgment. The clause was inserted to provide for a class of cases where the right of action was perfect, but the fraud had not been discovered until a subsequent period: *Gates* v. *Andrews*, 87 N. Y. 657; 97 Am. Dec. 764. It is, however, a sufficient answer to the claim based on this clause of subdivision 5 that there is no evidence or finding that the plaintiff or his assignor, Fish, had any notice of the fraudulent transfer until shortly before the commencement of the action.

The further claim is made that a cause of action for money

had and received could have been maintained by Fish against the defendant to recover the overpayment on the mortgage, immediately after the money came to his hands, he having received and retained it without consideration, and that this cause of action was barred by the lapse of six years and before this action was brought. The defendant may be right in his [*339] contention: *Roberts* v. *Ely*, 113 N. Y. 128. But assuming this to be true the present action is not based on an original liability of the defendant arising from his connection with the sale of the mortgage. The plaintiff's assignor did not elect to proceed against the defendant upon this liability. He brought his action against Phebe Haviland, the principal in the transaction, and on recovering judgment against her brought this action based upon that judgment, to charge the defendant on account of his fraudulent dealings with her to the prejudice of her creditors. The cause of action is entirely distinct from the cause of action against him for money had and received, and is in no way dependent upon his original relation to the transfer of the mortgage or the recovery had thereon. He is called upon to answer for the property of Phebe Haviland, received by him in fraud of her creditors. Whether he was connected with the original fraud in the sale of the mortgage is wholly immaterial in the present action, except as it may reflect upon his fraudulent intent in his subsequent dealings with Phebe Haviland.

We think the defense of the statute of limitations failed, and the judgment should therefore be affirmed with costs.

All concur.

Judgment affirmed.

LIMITATIONS OF ACTIONS—SETTING ASIDE FRAUDULENT TRANSFERS.—A cause of action by a creditor to set aside an assignment as fraudulent and void does not accrue until he has recovered judgment upon his debt and execution has been returned unsatisfied: *Gates* v. *Andrews*, 37 N. Y. 657; 97 Am. Dec. 764, and note; *Scott* v. *McMillen*, 1 Litt. 302; 13 Am. Dec. 239.

PARTIES MAY GO BEHIND THE JUDGMENT IN AN ACTION BY A JUDGMENT CREDITOR TO SET ASIDE CONVEYANCES of his debtor's real estate as being a fraud on creditors, and may inquire as to the validity of the indebtedness upon which it is based, or whether it existed at the time the conveyances were made: *Bruggerman* v. *Hoerr*, 7 Minn. 337; 82 Am. Dec. 97. See the notes to *Massey* v. *Gorton*, 90 Am. Dec. 291, and especially to *Candee* v. *Lord*, 51 Am. Dec. 298.

ROCHESTER DISTILLING COMPANY *v.* RASEY.

[142 NEW YORK, 570.]

A MORTGAGE UPON CHATTELS HAVING NO ACTUAL OR POTENTIAL EXISTENCE cannot operate to charge them with a lien when they come into existence as against an attaching or execution creditor.

CHATTEL MORTGAGE—POTENTIAL EXISTENCE.—That which is an annual product of labor or of the cultivation of the earth cannot be said to have an actual or potential existence before it is planted so as to support a chattel mortgage thereof, though the mortgagor is in possession of the land upon which he then intends to plant the crops which he seeks to mortgage.

ACTION to recover possession of certain personal property under a mortgage made by one Lovell, a lessee of farm lands, in favor of one Page, in April, 1890. The mortgage purported to cover "the grass now growing upon the leased premises, also all the corn, potatoes, oats, and beans which are now sown or planted, or which are hereafter sown or planted during the next year." Only a small portion of the land had been planted with potatoes at the time the mortgage was executed. On July 5, 1890, an execution issued against Lovell in favor of plaintiff was levied upon the growing crops and thereunder they were afterwards sold to plaintiff. Afterwards, the holder of the chattel mortgage foreclosed, and at a sale thereunder the growing crops were bought by the defendant who took possession thereof. The trial judge directed a verdict for the plaintiff as to the beans, they having been entirely planted after the execution of the mortgage, and for the defendant as to the potatoes. On appeal to the general term the exception of the plaintiff to the ruling of the trial judge was sustained, and a new trial ordered, and thereupon an appeal was taken to this court.

De Merville Page, for the appellant.

George D. Reed, for the respondent.

575 GRAY, J. I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy, and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion, in several

cases of a kindred nature, in the reports of this court and of other courts in this state, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching or an execution creditor, has frequently been discountenanced and repudiated. *Grantham* v. *Hawley*, Hob. 132, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a [576] present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases, which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect, as a reservatien at the time of the title to the product of the land. That was the case of *Andrew* v. *Newcomb*, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax; because the subject was not in existence. He held that the idea of a pledge or of a sale had no application, and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third

person of crops yet to be planted. Mr. Thomas, in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (sec. 149) "the weight of authority inclines to the view that the lien is an equitable one, and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agreement"; and again, he says "the authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching or judgment [577] creditors of the mortgagor." About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in præsenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor; which equity would enforce as against the latter.

In *Bank of Lansingburgh* v. *Crary*, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain, one, two, or three years previous to its production."

In a subsequent case, the same learned judge considered the nature of a mortgage relating to property not then in existence and its effect as to creditors of the mortgagor. In *Otis* v. *Sill*, 8 Barb. 102, the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel, and all scythes, iron, steel, and coal which may be purchased in lieu of the property aforesaid." Subsequently, the property was taken under executions issued on judgments, and the action was brought for its taking and detention. Paige, J., refers to his opinion in *Bank*

of Lansingburgh v. *Crary*, 1 Barb. 542, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question [578] of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property, and that no specific lien was created thereby. He says: "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only, and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In *Gardner* v. *McEwen*, 19 N. Y. 123, the chattel mortgage to the plaintiff, upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey* v. *Woodin*, 65 N. Y. 459, 22 Am. Rep. 644, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the nonpayment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the right of the landlord to do so; holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles; observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner* v. *McEwen*, 19 N. Y. 123, it was remarked that that "is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages." [579] Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable

rights, as a defense to the plaintiff's (the lessee's) action of trover. In the same case Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property, which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey* v. *Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Justices Learned and Bockes, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey* v. *Woodin*, 65 N. Y. 459, 22 Am. Rep. 644, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats* v. *Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs* v. *Alford*, 120 N. Y. 519, recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired; but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor, which being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediately delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon nonexistent things; or that such an instrument could operate to defeat the lien of an attaching or an execution [sic] creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien, and the levy of the execution upon the crops operated to transfer their possession from the owner to that of

the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim, and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the general term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed, and under the stipulation judgment absolute should be ordered for the plaintiff, with costs in all the courts.

All concur, except EARL, J., not voting.

Ordered accordingly.

CHATTEL MORTGAGES—POTENTIAL EXISTENCE.—A chattel mortgage of a crop to be grown in the future, but which has not been planted at the time of the execution of the mortgage, is void as against subsequent purchasers or attaching creditors: *Long* v. *Hines*, 40 Kan. 216, 220; 10 Am. St. Rep. 189, 192, and note; *Luce* v. *Moorehead*, 73 Iowa, 498; 5 Am. St. Rep. 695; *Shaw* v. *Gilmore*, 81 Me. 396; *Hutchinson* v. *Ford*, 9 Bush, 318; 15 Am. Rep. 711. *Contra*, see *Arques* v. *Wasson*, 51 Cal. 620; 21 Am. Rep. 718, and *Moore* v. *Byrum*, 10 S. C. 452; 30 Am. Rep. 58, and note. A mortgage on an unplanted crop conveys only an equitable title, but this attaches instantly on planting: *Mayer* v. *Taylor*, 69 Ala. 403; 44 Am. Rep. 522, and note; *Wood* v. *Minneapolis etc. Co.*, 48 Minn. 404. Where a mortgage is executed on an unplanted crop, a lien in equity attaches as soon as the subject of the mortgage comes into existence: *Apperson* v. *Moore*, 30 Ark. 56; 21 Am. Rep. 170. A mortgage of personal property not at the time in existence cannot, as a general rule, be enforced in a suit at law: *Morrill* v. *Noyes*, 56 Me. 458; 96 Am. Dec. 486, and note; *Borden* v. *Croak*, 131 Ill. 68; 19 Am. St. Rep. 22, and note. See, also, the extended note to *Gregg* v. *Sanford*, 76 Am. Dec. 722.

CASES

IN THE

SUPREME COURT

OHIO.

HIRTH *v.* GRAHAM.

[50 OHIO STATE, 57.]

IF A JUSTICE OF THE PEACE INSTRUCTS A JURY he must instruct them correctly, otherwise the judgment, which is probably the result of the erroneous instruction, will be set aside.

STATUTE OF FRAUDS.—A SALE OF GROWING TIMBER to be presently cut and removed from the land is a contract concerning the land, and is within the statute of frauds, and inoperative, unless evidenced by a writing.

James H. Beebe, for the plaintiff in error.

Andrews and Simms, for the defendant in error.

58 BRADBURY, J. The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber.

The defendant attempted to secure the dismissal of the action on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence 59 that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant"; which instruction the justice refused to give, but, on the contrary, gave to them the

following instructions on the subject: "This is an action for damage, not on the contract, nor to enforce the same, and if you find that a contract was made, verbal or otherwise, and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such noncompliance."

The defendant in error, who was also the defendant in the justice's court, excepted, both to the charge as given, and to the refusal to charge as requested; the verdict and judgment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the court of common pleas on error, where the judgment of the justice of the peace was affirmed; he thereupon brought error to the circuit court, where the judgments of the court of common pleas and that of the justice were both reversed, and it is to reverse this judgment of the circuit court, and reinstate and affirm those of the court of common pleas and justice of the peace, that this proceeding is pending.

Counsel for plaintiff in error contends that the record contains nothing to show that the trees which were the subject of the contract were standing or growing, and that therefore it does not appear that the defendant was injured by the instructions given and refused. The record does not support this contention. During the trial three separate bills of exceptions were taken, and, when all of them are considered together, it clearly appears that evidence was given tending to prove that the trees, the subject of the contract, were growing on the land at the time it was made, and that the contract was not evidenced by any note or memorandum in writing. The instruction refused was, ^{so} therefore, pertinent, and, if it contained a sound legal proposition, the refusal to give it in charge to the jury was prejudicial to the defendant. The court, however, not only refused to give the instructions requested by the defendant, but told the jury in substance that no written memorandum was necessary.

Great doubt exists in the minds of many eminent jurists whether, in this state, a justice of the peace is bound to instruct a jury at all; the Code of Civil Procedure specifically imposes this duty upon the courts of common pleas (Rev. Stats., sec. 5190), but is silent upon the subject as respects justices of the peace, unless by section 6705 of the Revised Statutes the provisions of the Code of Civil Procedure, respecting the duties

of courts of common pleas in this particular, are made applicable to justices' courts, which admits of grave doubts. The courts of last resort, in the states of Iowa and Nebraska, have held that a justice of the peace has no authority to instruct the jury on the trial of an action in his court: *St. Joseph Mfg. Co.* v. *Harrington*, 53 Iowa, 380; *Ives* v. *Norris*, 13 Neb. 252. And it has been held in New York that the jury were the judges of the law as well as of the facts: *McNeil* v. *Scoffield*, 3 Johns. 436; *Trustees etc.* v. *Thorne*, 6 Hill, 326. The supreme court of Georgia holds that "the law does not require a justice of the peace to charge the jury at all, and it would seem best that he should not do so; but, if he undertakes to instruct them, he must do so correctly": *Bendheim* v. *Baldwin*, 73 Ga. 594; *Adams* v. *Clark*, 64 Ga. 648.

In *Delancy* v. *Nagle*, 16 Barb. 96, the justice of the peace had been requested to give to the jury a pertinent and correct proposition of law; this he refused, saying "that the jury had heard all the testimony and the arguments of counsel, and were the judges of the law and the evidence, and that the court had nothing more to say to them, and would leave the matter for their consideration." On appeal, the supreme court say: "The justice in this case left the whole matter to the jury, law as well as fact. He did not, as the appellant's counsel supposes, by implication, charge the converse of the defendant's propositions. [61] They were left unfettered, to decide both the law and the fact. We cannot say that they have decided wrong."

There is strong ground to contend, in reason as well as upon authority, that a justice of the peace may deny a request to give in charge to a jury a sound and pertinent legal proposition; no such duty is specifically enjoined on him by any statute of this state; nor is he clothed with power to enforce his instructions by granting a new trial should they be disregarded by the jury. Neither does he usually possess legal knowledge superior to that of the jurors whom he is requested to instruct.

The opposite doctrine, however, is not without eminent authority in its favor. Judge Swan, in his valuable treatise for the guidance of justices of the peace, lays down the rule that a justice is bound to give to the jury proper instructions when so requested: Swan's Treatise, 183, 189. And the same view is taken by Judge Boynton in *Kaufman* v. *Broughton*, 31 Ohio St. 430. No authority, however, is cited by

either of these eminent jurists in support of the proposition advanced by them, nor do either discuss it on principle, but seem to have taken it to be conceded as matter of course. The direct question has not heretofore been considered by this court, nor does it necessarily arise in the case under consideration; for the justice in this case did not merely decline to give an instruction which he had been requested to give, and then submit the evidence to the jury without any instructions whatever, but he actually gave them in charge a proposition substantially the converse of that which was requested. The highest courts of the states of Iowa and Nebraska hold that an instruction given by a justice of the peace to a jury is a mere nullity that they will not review: *St. Joseph Mfg. Co.* v. *Harrington*, 53 Iowa, 380; *Ives* v. *Norris*, 13 Neb. 252. On the other hand, the doctrine in New York and Georgia is, that while a justice is not bound to instruct a jury, yet, if he does so, it must be done correctly: *Bendheim* v. *Baldwin*, 73 Ga. 594; *Adams* v. *Clark*, 64 Ga. 648; *Delancy* v. *Nagle*, 16 Barb. 96; *Trustees etc.* v. *Thorne*, 6 Hill, 326. The latter rule, we think, is the better one. Without [62] passing upon the question of the duty of a justice of the peace, to give to the jury a sound and pertinent legal proposition when he is so requested, we hold that if he does instruct them, whether pursuant to a request or not, he is bound to lay down the law correctly; for a jury are quite likely to respect the official character of the justice, and be influenced by the instructions that he may give to them under the sanction of his office.

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England particularly have varied widely in their holdings on the subject.

Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute: *Emmerson* v. *Heelis*, 2 Taunt. 38, following the case of *Waddington* v. *Bristow*, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in *Crosby* v. *Wadsworth*, 6 East, 601, 610, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying:

"Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them), "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time, and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands."

Afterwards, in *Teal* v. *Auty*, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which has been to greatly narrow the application of the fourth section of the statute of frauds to crops or timber growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and, in some instances, growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in *Marshall* v. *Green*, 1 C. P. Div. 35, decided in 1875. The *syllabus* reads: "A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benjamin on Sales, sec. 126, ed. of 1892), it cannot be considered as finally settling the law of England on this subject.

The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, sales of growing trees to be presently cut and removed by the vendee are held not to be within the operation of the fourth section of the statute of frauds: *Claflin* v. *Carpenter*, 4 Met. 580; 38 Am. Dec. 381; *Nettleton* v. *Sikes*, 8 Met. 34; *Bostwick* v. *Leach*, 3 Day, 476;

Erskine v. *Plummer*, 7 Me. 447; 22 Am. Dec. 216; *Cutler* v. *Pope*, 13 Me. 377; *Cain* v. *McGuire*, 13 B. Mon. 340; *Byassee* v. *Reese*, 4 Met. (Ky.) 372; 83 Am. Dec. 481; *Smith* v. *Bryan*, 5 Md. 141; 59 Am. Dec. 104. In none of these cases except *Byassee* v. *Reese*, 4 Met. (Ky.) 373, 88 Am. Dec. 481, and in *Cain* v. *McGuire*, 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited, *Marshall* v. *Green*, 1 C. P. Div. [64] 35, the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before any thing is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, *Giles* v. *Simonds*, 15 Gray, 441, 77 Am. Dec. 373, holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter on his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation."

The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds: *Green* v. *Armstrong*, 1 Denio, 550; *Bishop* v. *Bishop*, 11 N. Y. 123; 62 Am. Dec. 68; *Westbrook* v. *Eager*, 16 N. J. L. 81; *Buck* v. *Pickwell*, 27 Vt. 157; *Cool* v. *Peters Box & Lumber Co.*, 87 Ind. 531; *Terrell* v. *Frazier*, 79 Ind. 473; *Owens* v. *Lewis*, 46 Ind. 488; 15 Am. Rep. 295; *Armstrong* v. *Lawson*, 73 Ind. 498; *Jackson* v. *Evans*, 44 Mich. 510; *Lyle* v. *Shinnebarger*, 17 Mo. App. 66; *Howe* v. *Batchelder*, 49 N. H. 204; *Putney* v. *Day*, 6 N. H. 430; 25 Am. Dec. 470; *Bowers* v. *Bowers*, 95 Pa. St. 477; *Daniels* v. *Bailey*, 43 Wis. 566; *Lillis* v. *Dunbar*, 62 Wis. 198; *Knox* v. *Haralson*, 2 Tenn. Ch. 232.

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its

other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil: *Jones* v. *Timmons*, 21 Ohio St. 596. Coal, petroleum, building-stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty.

This rule has the additional merit of being clear, simple, and easy of application, qualities entitled to substantial weight in choosing between conflicting principles.

Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

STATUTE OF FRAUDS—SALE OF STANDING TIMBER.—Contracts for the sale of standing timber are contracts for the sale of an interest in land, and must be in writing under the statute of frauds: *Owens* v. *Lewis*, 46 Ind. 488; 15 Am. Rep. 295; *Slocum* v. *Seymour*, 36 N. J. L. 138; 13 Am. Rep. 432. Trees growing on land so far partake of realty that any contract for their sale is within the statute of frauds; yet if the contract is in contemplation of their severance, whereby they become personalty, the same rule in respect to the identification of personal property is applicable: *Carpenter* v. *Medford*, 99 N. C. 495; 6 Am. St. Rep. 535. This question is fully discussed in the extended note to *Kingsley* v. *Holbrook*, 36 Am. Dec. 182, and *Purner* v. *Piercy*, 17 Am. Rep. 595.

COLUMBUS GAS LIGHT AND COKE CO. *v.* COLUMBUS.

[50 OHIO STATE, 65.]

MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREETS.—Under a statute declaring that the council of a city shall have the care, supervision, and control of all public streets, and shall cause them to be kept open and in repair, such council may change the grade of a street already improved without creating any liability against the municipality in favor of a corporation having gas-pipes in the street under an easement granted to it by the city, and which pipes must necessarily be taken up and relaid as a consequence of the change in the grade.

A MUNICIPAL CORPORATION CANNOT ABROGATE ITS OWN POWER.—Therefore any grant of an easement to lay pipes in a street is subject to the legislative power of the municipality over such street.

MUNICIPAL CORPORATIONS—DAMAGES FOR CHANGE OF GRADE OF.—A gas company which has been granted the right to lay and maintain its pipes in a public street does not thereby acquire an easement to maintain them in the place where they are so laid, and therefore cannot recover damages resulting from a subsequent change in the grade of the street, the consequence of which will be the taking up and relaying of such pipes.

MUNICIPAL CORPORATIONS—EASEMENTS IN PUBLIC STREETS.—The granting of a right to lay and maintain pipes in a public street must be interpreted in the light and duty of the city to regrade whenever, in its judgment, the public interests demand, and the easement must be accepted and received in common with equivalent rights which have been acquired by other public agencies, rights of a secondary character, and all must give way to the paramount duty of the city to care for the streets and keep them open, in repair, and convenient for the general public.

ACTION by the plaintiff in error to recover damages sustained from a change in the grade of a street. The defendant interposed a demurrer to the complaint, and the only question was whether such complaint stated a cause of action. It was in the words and figures following:

"The plaintiff, the Columbus Gas Light and Coke Company, is a corporation duly organized under the laws of this state, for the purpose of supplying gas for lighting the streets and public and private buildings of the city of Columbus. The defendant, the said city of Columbus, is a municipal corporation of this state, located in Franklin county, and organized as a city of the first grade of the second class.

"The plaintiff is, and, for more than thirty years last past has been, the owner of a certain easement or right in the public streets and alleys of the defendant, duly and for sundry valuable considerations granted by the defendant to the plaintiff, to wit: The right to lay and maintain its pipes in

the said public streets and alleys for the purpose of conveying gas to the said city and the citizens thereof.

"In the exercise and enjoyment of said right, and, in accordance with the terms and conditions of the same, the plaintiff, several years prior to the year A. D. 1887, for the purpose of conveying gas to the said city and the citizens thereof, laid in that part of Broad street (one of the public streets of said city), between Winner avenue and Reed avenue, and in conformity with the grade of said part of said street, which was then already established, a main pipe and a service pipe, and continued to maintain and use said pipes for the purposes aforesaid, until, in the summer of 1887, the defendant changed the grade of said part of said street, excavated the ground and lowered the level thereof, and thereby interfered with plaintiff's said pipes, necessitating the removal or abandonment of the same, and the relaying by plaintiff of pipes to conform to the new grade, to plaintiff's damages in the sum of four hundred and six dollars and sixty cents, with accruing interest.

"Plaintiff filed its said claim for damages with the clerk of said city of Columbus on the twenty-fourth day of January, A. D. 1888, but the same is still wholly unpaid.

"Wherefore plaintiff asks judgment against the defendant for the said sum of four hundred and six dollars and sixty cents with accruing interest."

R. H. Platt, for the plaintiff in error.

Paul Jones and Florizel Smith, for the defendant in error.

[67] SPEAR, C. J. The single question is as to the sufficiency of the petition. If that states a cause of action, the judgment of the circuit court should be reversed; if not, the opposite result follows.

It will be noted that there is no direct allegation that the grant from the city gave the company the right to maintain its pipes at any particular place in the street, nor at any prescribed depth beneath the surface. Nor is it averred that the action of the city was, in any way, wanton, nor that the change of the grade of the street was unnecessary; and the presumption is that the city acted, in that behalf, lawfully and without negligence. Nor is it pretended that the city has denied the company's right to maintain its pipes in Broad street. The dispute involves only the right to maintain them where first laid.

The company's claim is that, while the consent of the city must first be obtained, the city having the right to make reasonable regulations as to the terms and conditions, on which the company may occupy, yet, when the city has so given its consent, has made the grant, the right in the streets is in the nature of an easement which then belongs to the company by force of the statute, and the city cannot interfere with that right, save upon condition of awarding compensation for resulting damage.

It is freely conceded that the company is a public agency. It is further conceded that the use of streets and alleys for gas-pipes, through which gas is to be conducted for the use of the city and its people, is a recognized public use and purpose, and that the general right to so lay and maintain such conductors is created by statute. This is, however, upon condition of consent by the municipal authorities, and under such reasonable regulations as they may prescribe. And cities are specially authorized to provide for the laying down of gas-pipes.

But, while all this is conceded, it must always be kept in mind that the primary use of the streets is not for the laying of gas-pipes. That is but an incidental, a secondary, use. Above all other uses is the accommodation of the public travel. Our statute, section 2640, prescribes the city's duty thus: "The council shall have the care, supervision, and control of all public highways, streets, avenues, ... within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

This necessarily implies the duty, as well as the right, to grade, in order that the streets may be accessible, convenient, and in good repair. It also implies that the duty as well as the right is a continuing one. The duty is not to open the streets and put them in repair, but to keep them open and in repair. This matter of grading is not, necessarily, a single operation. The duty of exercising the power anew, therefore, follows the changing conditions and needs of the public. The power is a legislative one. It is to be enforced by ordinance. The council is to perform the duty, and it is elementary, we suppose, that the council cannot, in the exercise of legislative powers, bind its successors, unless authority from the state to do so is clearly indicated. The corporation cannot abridge its own legislative power.

It would follow from this that in prescribing regula-

tions, or annexing conditions, by the city, to the exercise by a gas company, of a right in a street to enjoy the same for this secondary use, the council has not the authority to cede away, nor bargain away, the right of the city to perform its public duties, especially as to a primary use of its streets, nor to abridge the capacity of its successors to discharge those duties, unless some express provision of statute is found to that effect, and that is not claimed.

The power to regrade, and the duty of exercising the power under proper conditions, being established, does liability for damage follow its exercise in such a case as the one at bar?

If it can be maintained that the company has acquired an easement giving it the right to continue its pipes at the particular place in the street where they were placed, there would be strong reason for concluding that liability for damage would follow their disturbance by the process of grading; otherwise, not.

It is insisted that the easement of the company, acquired by the grant from the city, is a right as substantial as that of an abutting owner, and that its right to compensation for interference with pipes laid in conformity with an established grade is as well founded as that of an owner of abutting property to compensation for an interference arising in the same way. There are some points of similarity between the two situations, but we think there are more differences. The street is often dedicated by the owner, or his predecessor in title to public use, and, if required by appropriation, he is liable to compulsory contribution for payment of land taken. By reason of owning the abutting land he has a property right in the street itself, as much property as his lot. Under some circumstances trees growing in the street in front of his lot are his property, and he may maintain them there, subject only to the free use of the street by the public. In case of abandonment the title to the middle of the highway itself, ordinarily, reverts to him. Among other rights is that of access to and from his premises, and where he has so improved in conformity with an established grade, the damage occasioned by a material change of grade is immediate and often serious. A marked difference between the two rights is found in their origin. In no single particular does the landowner get any property right in the street from the city. No consideration of the city's power is brought in question in estimating the character of the lotowner's right in the street.

It inheres in the very ownership of the lot, as an incident to it. None of these characteristics attach to the company's easement. In no sense is it the owner of land adjoining the highway. A fair construction of the petition makes of it no more than a naked right to place and keep its pipes somewhere in the street. And this, we think, is the extent of the council's power. An ordinance to grant an exclusive right, or a perpetual right to occupy a particular part of the street, would be an attempt to bind succeeding councils as to their exercise of legislative power, and would, for reasons stated, be ineffectual. The grant by the city must be interpreted in the light of the right and duty of the city to regrade whenever, in its judgment, the public interest demands, and whatever easement the gas company can receive, it must accept and enjoy in common with equivalent rights, which have been or may be acquired by other public agencies, rights of a like secondary character, and all must give way to the paramount duty of the city to care for the streets and keep them open, in repair, and convenient for the general public. This duty would be seriously interfered with if the city could not change the grade of its streets, save upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade, or other improvement, in its streets.

[71] Attention has been called to some authorities which seem to give sanction to the company's claim in this case. But we are impressed that they do not in this respect express the spirit of our statutes and decisions.

On the other hand, counsel for the city have cited authorities which support the conclusions here reached: See Dillon on Municipal Corporations, *hic et ibi;* Lewis on Eminent Domain, secs. 107, 109; *Goszler* v. *Georgetown*, 6 Wheat. 593; *Brenham* v. *Brenham Water Co.*, 67 Tex. 542; *Pond Aqueduct Corp.* v. *Brookline*, 121 Mass. 5; *Matter of Deering*, 93 N. Y. 361; *National Water Works Co.* v. *Kansas City*, 28 Fed. Rep. 921; *Rockland Water Co.* v. *Rockland*, 83 Me. 267.

We think the petition does not state a cause of action.

Judgment affirmed.

MUNICIPAL CORPORATIONS—LIABILITY FOR ALTERING GRADE OF STREET. For a thorough discussion of this subject, see *O'Brien* v. *Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. 832, and the monographic note thereto. A city is liable to a lotowner for such damages as he may sustain by a change in the grade of the street in front of his lot, when the buildings were erected before any grade was established: *Hammond* v. *City of Harvard*, 31 Neb. 635. An abutting lotowner is entitled to damages sustained by the grading of a street in front of his lot where there was a prior established grade: *City of Anderson* v. *Bain*, 120 Ind. 254. But he is restricted in his right to recover for the injury to his land alone, and not for injury to his house: *Groff* v. *Philadelphia*, 150 Pa. St. 594. See, also, the note to *Goddard* v. *Inhabitants*, 30 Am. St. Rep. 389.

MUNICIPAL CORPORATIONS.—DELEGATION OF POWERS: See the extended note to *Birdsall* v. *Clark*, 29 Am. Rep. 108–110, and the note to *Thompson* v. *Schermerhorn*, 55 Am. Dec. 386.

COMMISSIONERS *v.* ROSCHE.

[50 OHIO STATE, 103.]

CONSTITUTIONAL LAW—RETROSPECTIVE STATUTES.—A STATUTE CREATING A CAUSE OF ACTION in favor of persons who have voluntarily paid taxes on property not subject to taxation, and requiring the county commissioners to repay the amount of such taxes out of any unexpended funds belonging to the county or in the treasury thereof, is retrospective and invalid.

A STATUTE IS RETROACTIVE if it creates a new right, rather than affords a new remedy to enforce an existing right.

A RETROSPECTIVE OR RETROACTIVE LAW IS one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new remedy, or attaches a new disability in respect to transactions or considerations already passed.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—A statute authorizing persons in any county containing a city of the first grade of the first class to maintain actions against such county to recover moneys voluntarily, but erroneously, paid on property not subject to taxation, for the recovery thereof, is special legislation upon a subject which ought to be uniform throughout the state, and contravenes section 26 of article 2 of the constitution of Ohio requiring general laws to have a uniform operation.

ACTION to recover taxes illegally assessed against and paid by plaintiff in Hamilton county. Judgment for the plaintiff, and defendant appealed.

Spiegel and Bromwell, for the plaintiffs in error.

Smith and Martin, and Reemelin and Reemelin, for the defendants in error.

[108] BRADBURY, J. The defendants in error were tanners, engaged in the city of Cincinnati, in manufacturing leather

from the skins of animals. In the years 1875, 1876, 1877, and 1878 the auditor of state provided blank forms to be used by the assessors in the several townships and wards of the municipalities of the state, to secure a uniform listing for those years, of the personal property within the state subject to taxation, and upon this form promulgated certain 100 instructions to aid the assessing officers and property-owners to determine what property should be listed and the proper method of listing it.

This form, with the instructions printed upon it, was provided and furnished to the county auditors of the several counties throughout state. Among the instructions thus given by the auditor of state was the following: "Manufacturers must include the average value of raw material used and on hand in the manufactured and unmanufactured articles." Pursuant to these instructions the defendants, in the years above named, listed not merely the average monthly value of the raw material "purchased, received, or otherwise held," to be used in manufacturing, but included also the average value of the raw material in manufactured articles on hand or in process of being manufactured. The defendants in error in the original action sought to recover the taxes that they had paid upon the raw material that was in the manufactured and partly manufactured articles on hand. These taxes were all paid, and all the assessments, except that of 1875, were made after it had been held by the supreme court commission, that raw material in manufactured and partly manufactured articles was not taxable: *Sabastian* v. *Ohio Candle Co.*, 27 Ohio St. 459.

In 1881 the defendants in error and a number of others in like situation, including Eckstein, Hill & Co., manufacturers of white lead, etc., filed claims with the county auditor of Hamilton county, for the refunder of the taxes thus paid by them respectively. Payment being refused, Eckstein, Hill & Co. brought an action in the court of common pleas of Hamilton county against the county commissioners of that county to enforce their claim; they prevailed in that court; whereupon the county commissioners instituted proceedings in the district court of Hamilton county to reverse the judgment of the court of common pleas. The district court reversed the judgment of the court of common pleas upon the ground that in law there was no right of recovery: *Commissioners* v. *Eckstein*, 4 Cin. Law Bull. 989. Which judg-

ment of the district court was afterwards [110] affirmed by this court. In the year 1890, after these adverse decisions had been made, and relief denied to parties situated like the defendants in error, the general assembly passed the following act: 87 Ohio Laws, 212.

"That if any county containing a city of the first grade of the first class, the county or state auditor has sent by any assessor to any person, firm, or corporation a blank upon which to return property for taxation, under section 3742 of the Revised Statutes of Ohio, with instructions in said blank showing and directing such person, firm, or corporation how the said return should be made of such property for taxation, which instructions have been erroneous and contrary to the said section 2742, and such person, firm, or corporation has made return in accordance with such erroneous instructions, and by reason of following said erroneous instructions said person, firm, or corporation has returned for taxation, and paid taxes upon property which, under the said section 2742, should not have been listed, such listing and payment shall be held to be involuntary, and the court of common pleas of said county, in an action brought by any such person, firm, or corporation against the county commissioners of said county, and upon lawful proof of any such involuntary payment, shall render judgment for the recovery of the amount of said payment, but without interest or costs; and thereupon such county commissioners shall cause the same to be paid out of any unexpended funds belonging to said county in the county treasury. *Provided*, however, that no taxes so erroneously paid shall be so sued for and refunded by said county commissioners unless a claim in writing, duly verified by such person, firm, or corporation, has been filed and presented therefor with the county auditor of such county within six years from the time of payment of such erroneous taxes."

Upon this statute the defendants in error predicate their right to recover. The plaintiffs in error assail its constitutionality upon three distinct grounds, only two of which we think it necessary to consider: 1. Its retroactive character and effect; and 2. That it is special legislation on a subject of a general nature.

[111] However steadily we may keep in mind the general rule, that statutes should be construed to operate prospectively only, when susceptible of that construction, there still

remains little, if any, doubt that the legislature intended the above-quoted statute to operate retrospectively; and it is only little less certain that the object was to vitalize the claims of the defendants in error, and of others in Hamilton county in like situation. At least, the language of the statute is explicable upon no other hypothesis than that it was intended to operate upon past transactions; the only doubt in this respect is whether its operation should not be limited to past events, and its prospective operation denied altogether. The words of the statute uniformly refer to the past, in prescribing the circumstances that are to set it in operation. The language is, "If any auditor 'has sent' a blank with instructions, which instructions 'have been' erroneous, and a return 'has been made' accordingly," etc., then a recovery may be had. The statute, therefore, should be held to be retroactive, and apply to the state of facts that constitutes the cause of action of the defendant in error.

However, every statute that is designed to act retrospectively is not retroactive within the terms of section 28 of article 2 of the constitution of 1851, which forbids the general assembly of this state to pass "retroactive" laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.

Judge Story defines a retrospective, or retroactive, law as follows: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective": *Society etc.* v. *Wheeler*, 2 Gall. 104–139. This definition was approved by this court in *Rairden* v. *Holden*, 15 Ohio St. 207. It was also [112] adopted by the supreme court of the United States in *Sturges* v. *Carter*, 114 U. S. 511.

The statute under consideration, when tested by these principles, operates retroactively in its application to the claim of defendants in error. The last payment of the taxes that they sought to recover was made more than nine years before the law was passed. The property had been listed and the taxes thereon paid voluntarily. They interposed no objection or protest to the payment, nor was any threat or

offer made by the county treasurer to compel payment by summary or other process provided by statute for that purpose. For money paid under these circumstances the well-settled law of this state, as it then stood, and remained up to the time of the passing of this statute, forbade a recovery: *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Marietta* v. *Slocomb*, 6 Ohio St. 471; *Wilson* v. *Pelton*, 40 Ohio St. 306; *Whitbeck* v. *Minch*, 48 Ohio St. 210. Nor did the circumstances under which it was listed constitute such an error as might be corrected, and a refunding order drawn by the county auditor by virtue of section 1038 of the Revised Statutes, for the excess that was thus paid: *State* v. *Commissioners*, 31 Ohio St. 271; *State* v. *Cappellar*, 5 Cin. Law Bull. 833. Therefore, when the defendants in error voluntarily, though erroneously, listed their property, and voluntarily paid the taxes assessed upon it, neither by statute nor by any principle of the common law as administered in Ohio, was an obligation imposed upon the county of Hamilton to refund the money received. If such an obligation had existed, the forms of procedure then provided by our system of practice were ample to afford complete relief. The obstacle in the way of the defendants in error was not inadequate methods of procedure, but the absence of a law vesting in them a right of recovery. This want the statute under consideration attempted to supply.

This statute, it is contended, is remedial, and remedial statutes may be retroactive. It is remedial, no doubt, in that enlarged sense of that term, where it is employed to designate laws made to supply defects in, or pare away hardships of, the common law, but not remedial in the sense of providing [113] a more appropriate remedy than the law before afforded, to enforce an existing right or obligation. The statute under consideration provided no new method of procedure; it simply imposed upon Hamilton county an obligation towards these plaintiffs in error that did not attach to the transaction when it occurred. In attempting to accomplish this result the legislature transcended its constitutional powers.

Counsel contend that the statute is in furtherance of natural justice, and that the clause of the constitution under consideration does not prohibit retroactive laws of that character: *Lewis* v. *McElvain*, 16 Ohio, 347; *Trustees etc.* v. *McCaughy*, 2 Ohio St. 152; *Acheson* v. *Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Burgett* v. *Norris*, 25 Ohio St. 308.

To uphold a statute on this ground, where it seeks to create a liability upon a past transaction, where none existed when it occurred, if it can be done at all, the natural justice of the object sought to be accomplished should be indisputable. In the case before us no misconduct is chargeable to the officials of Hamilton county. If the defendants in error are to be held free from negligence, and to have been innocently misled, it was the result of the erroneous instructions sent out by the auditor of state. The money that they now seek to recover from the county was voluntarily paid to the treasurer, who was bound to receive it. Without notice of any claim to its repayment by defendants in error, he distributed to the city of Cincinnati and the state their respective proportions of the fund. Under these circumstances the natural justice of requiring the taxpayers of Hamilton county to refund the entire sum is a question upon which minds may differ.

2. The subject of the statute under consideration is the right of the taxpayer, who has paid taxes upon property exempt from taxation, to recover from the public the money thus paid, and its object is to ameliorate the supposed harshness of the existing law in this particular. The rights of the taxpayer in this respect should be uniform throughout the state, which result can be attained only by a statute designed [114] to operate impartially upon every person who may bring himself within its beneficent provisions.

True, this court has held that a law is not necessarily one of a general nature, because it relates to a general subject: *State* v. *Shearer*, 46 Ohio St. 275. In that case the subject of the statute was the erection of certain territory in Stark county into a special school district, a matter purely local in that the wisdom of the statute depended upon the peculiar situation of the territory thus set apart, in respect, not only to the location of its parts to each other, but with reference to the location of the whole of it to the territory by which it was surrounded.

If circumstances can be conceived to exist which would warrant special legislation authorizing a taxpayer of one county only to recover from the public taxes that he had erroneously paid, they are not shown in this instance.

It was the duty of the auditor of state to send to each county in the state the same instructions for listing property that he sent to every other county therein, and, in the absence of any thing in the record to the contrary, it will be presumed

that he did so. If these instructions were erroneous, they operated equally throughout the state, and were as likely to cause manufacturers, in counties having no city of the first grade of the first class, to fall into errors in listing their property for taxation, as they were to cause those manufacturers who resided, or did business, within a county that contained such city; nor did the former, any more than the latter, have a claim against their respective counties for the refunding of the taxes voluntarily paid on property erroneously listed by reason of such instructions. And whatever amelioration of the hardships of the existing law in this respect that the legislature, in its wisdom, deemed just and right, should have been extended to the whole people of the state without regard to the county boundaries. Otherwise there might be as many different laws on the subject as there are counties within the state, and an action to recover taxes paid in one county could be maintained upon a state of facts that in an adjoining county would be wholly inadequate for that purpose. This want of uniformity in the laws prescribing the [115] rights and obligations of the inhabitants of the state was the very mischief that section 26 of article 2 was designed to prevent. We therefore hold that a statute like the one under consideration, the object of which is to alter the existing law respecting the right of a taxpayer to demand and recover from the public money erroneously, or mistakingly, paid by him, contravenes section 26 of article 2 of the constitution of 1851, unless it is given a uniform operation throughout the state.

The view this court adopts on the power of the general assembly to pass the act upon which the defendants in error predicate their right of action, disposes of the case, and renders any consideration of the other questions discussed by counsel unnecessary.

Judgment of the circuit and that of the court of common pleas reversed, and petition dismissed.

STATUTES—RETROSPECTIVE, WHEN.—Laws may be retrospective if they affect an existing cause of action, or an existing right of defense, by taking away or abrogating the same: *Clark* v. *Clark*, 10 N. H. 380; 34 Am. Dec. 165. The following cases illustrate this rule: *Davis* v. *Minor*, 1 How. (Miss.) 183; 28 Am. Dec. 325; *Woart* v. *Winnick*, 3 N. H. 483; 14 Am. Dec. 384, and note; *Hope Mut. Ins. Co.* v. *Flynn*, 38 Mo. 483; 90 Am. Dec. 438, and note. A law which affects past transactions and vested rights is retrospective and unconstitutional: *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; 11 Am. Dec. 79, and note; *Aldrige* v. *Tuscumbia etc. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307, and note; *Rawls* v. *Kennedy*, 23 Ala. 240; 58 Am. Dec. 289.

A statute operating on facts existing at the time of its passage, which attempts to impose an obligation which did not exist at the time of its passage, is unconstitutional: *Towle* v. *Eastern R. R.*, 18 N. H. 547; 47 Am. Dec. 153, and note; *Bellevue* v. *Peacock*, 89 Ky. 495; 25 Am. St. Rep. 552, and note. A statute giving a new remedy for an existing right, though retrospective, is not unconstitutional: *Goger* v. *Prout*, 48 Ohio St. 89. See, also, the notes to the following cases: *State* v. *Torinus*, 37 Am. Rep. 397; *Schenley* v. *Commonwealth*, 78 Am. Dec. 370; *Greenough* v. *Greenough*, 51 Am. Dec. 574, and *People* v. *Hayes*, 37 Am. St. Rep. 533.

STATUTE—SPECIAL LEGISLATION.—A law, general in form, but of local application, is unconstitutional and void: *State* v. *Ellet*, 47 Ohio St. 90; 21 Am. St. Rep. 772, and extended note discussing special legislation. See, also, the extended note to *State* v. *Goodwill*, 25 Am. St. Rep. 883.

BANK OF MARYSVILLE *v.* WINDISCH-MUHLHAUSER BREWING COMPANY.

[50 OHIO STATE, 151.]

BANKING.—A CHECK DRAWN BY A DEPOSITOR ON THE BANK, unless it has been accepted, does not constitute an assignment so as to vest the fund or credit against which it is drawn, nor any part thereof, in the payee or holder.

BANKING.—MONEYS RECEIVED ON GENERAL DEPOSIT and commingled with other moneys of the bank become its property, and the relation between it and the depositor is essentially that of debtor and creditor.

BANKING.—A CHECK DRAWN UPON A BANK BY A GENERAL DEPOSITOR is not an order upon a specific fund, but merely a request that its amount be paid out of what is due the drawer, and therefore the holder is not entitled to its payment if the bank is not indebted to the drawer when it is presented.

BANKING—SETOFF.—A BANK HOLDING A DEPOSITOR'S NOTE PAST DUE is entitled to set it off against the amount due him upon his deposit account, and is therefore under no obligation to pay his check drawn against such account if it is exhausted before the check is presented by charging against it the amount of such note.

BANKING.—A DEPOSIT IN A BANK IS PRESUMED TO BE GENERAL in the absence of averment or proof to the contrary.

Porter and Porter, for the plaintiff in error.

D. W. Ayers, for the defendant in error.

154 WILLIAMS, J. The Windisch-Muhlhauser Brewing Company brought its action against the Bank of Marysville, in the court of common pleas of Union county, upon a check 155 drawn on the bank by George Schlegel, October 16, 1888, for the sum of three hundred and sixty-eight dollars and twenty cents, payable to the order of the plaintiff. The petition alleges, in substance, that on the nineteenth day of

October, 1888, the check, duly indorsed, was presented at the bank for payment, at which time Schlegel had sufficient funds on deposit in the bank to pay it, but payment was refused, because, before the presentation of the check, the whole of the amount standing to the credit of Schlegel on his deposit account, had been applied by the bank toward the payment of a note held by it, on which there was then due from Schlegel to the bank a sum greater than the amount of his deposit; which application, it is averred, was made without the plaintiff's knowledge or consent. The petition avers that Schlegel was insolvent when the check was presented for payment, and when it was drawn; and it also contains an allegation of the amount due on the check, for which, with interest, the plaintiff asks judgment. A general demurrer to the petition was overruled, and the defendant answered, alleging that at the time the check was drawn, Schlegel was indebted to the bank in the sum of ten hundred and fifty dollars, on a promissory note given to it by him, for money advanced, and other indebtedness contracted in the course of their business; and that on the seventeenth day of October, 1888, before the presentation of the check, and without any knowledge of its existence, the bank credited the note, which was then long past due, with the amount then owing to Schlegel on his deposit account, which was three hundred and seventy-eight dollars and forty-one cents, and therefore, when the check was presented, there were no funds with which to pay it. The answer also alleges that the deposit was not made for any particular purpose, nor under any special agreement or direction, but was a general deposit merely; and, that the defendant had no means of securing or satisfying Schlegel's indebtedness to it, except by applying thereon the balance due on the deposit, as was done.

A general demurrer to the answer was sustained, and judgment rendered for the plaintiff, which was affirmed by the circuit court. The bank here contends that both judgments should be reversed, because, it is claimed, the bank [156] had a lien on Schlegel's deposit as a security for his indebtedness, which gave it the right to apply the former to the payment of the latter; or, if it had not such a lien, it was entitled to set off Schlegel's indebtedness to it against the amount due him on his deposit account. The position taken by counsel for the defendant in error is, that Schlegel did not part with the ownership and control of his money by depositing it in

the bank, and his check constituted an assignment and appropriation of that amount of the specific fund on which it was drawn, to the plaintiff, after which the bank could not, without the plaintiff's consent, apply the fund in payment of Schlegel's past due note, or set off the one against the other. That view of the law appears to have been adopted by the courts below, and no other is advanced here, in support of the judgments they rendered.

There are cases in which it is held that a bank check for a part of the sum standing to credit of the drawer is an equitable assignment *pro tanto;* and expressions of that purport may be found in opinions of judges, in cases where the question was not involved. Counsel for defendant in error relies chiefly on *Stewart* v. *Smith*, 17 Ohio St. 82–85, where it is said: "Such a check is an appropriation of a specific sum, in the hands of the drawee, to the absolute use and control of the holder"; and, it is argued, that being such an appropriation, the title to the fund at once vests in the payee of the check, and cannot be defeated or affected by any subsequent act of the drawee. The question in that case was whether the drawer of the check was discharged by reason of delay in its presentation for payment; and the sentence above quoted from the opinion of the learned judge occurs in the discussion of the difference, in legal effect, of delay in presenting bills of exchange and bank checks for acceptance and payment. In the recent case of *Covert* v. *Rhodes*, 48 Ohio St. 66, it was held, after full consideration, that such a check, before acceptance, does not constitute an assignment, so as to vest the title to the fund or credit against which it was drawn, or any part of it, in the payee or holder. Some of the authorities which maintain [157] that doctrine are collected in that case, to which many more might be added. The rule results from the legal relation of the bank to its general depositors. The former is not a bailee or trustee in any sense of the money of the latter. The bank does not contract to keep on hand the particular money deposited, or pay the depositor's checks out of it, nor is it expected to do so. The moneys of such depositors are commingled with other moneys of the bank, the amount deposited carried to the customer's credit in account with the bank, and payments made on his checks are charged to his account. Unless there is some agreement to the contrary, deposits received by the bank become its property; they

belong to it, and can be loaned or otherwise disposed of by it, as any other money belonging to the bank. If the money be stolen or destroyed the loss must be borne by the bank, though it be free from negligence or fault. It is accountable as a debtor; and the relation between it and the general depositor is essentially that of debtor and creditor. In legal effect, the deposit is a loan to the bank. Hence, a check of such a customer is not drawn upon a specific fund, but is an order drawn by a creditor on his debtor, requesting him to pay part of what is due the creditor to the payee or holder. It no doubt evidences an intention of the drawer to have the sum specified paid to the holder, but does not transfer the title to any fund, or part of it, or the bank's liability to the drawer. If it effected such a transfer, then, upon the failure of the bank before the check could be presented, in the exercise of due diligence, the loss would fall on the holder as between him and the drawer; and whether presented or not, the former could pursue the deposit in the hands of an assignee or other representative of the bank. But as the check does not operate as a transfer of the title to any fund, neither of these consequences result.

The liability of the bank to Schlegel being that of a debtor only, it does not seem of much practical importance in the disposition of the case whether the effect of the check was to assign that much of his claim to the plaintiff or not. The case made by the pleadings is this: The bank [158] owed Schlegel on his deposit account, when he gave the brewing company his check, more than the amount for which it was drawn; at the same time Schlegel owed the bank on his note a sum greater than the bank's indebtedness to him; these mutual debts existed between the parties in the same relation, were both past due, and each was founded on contract. Our statute secures the right of setoff to parties sustaining the relation of debtor and creditor, between whom there are such cross demands, and those existing between banks and their customers are not excepted from its operation; so that, if Schlegel, when the check was drawn, had brought an action on his claim against the bank, the latter could have set off against it the debt which Schlegel owed the bank. And it is clear the right of setoff was not defeated or impaired by the check, even if it be treated as an assignment. The statute plainly protects the right of setoff, when it existed between the parties, notwithstanding the assignment, by either, of his

demand. Its language is "When cross demands have existed between persons, under such circumstances that if one had brought an action against the other a counterclaim or setoff could have been set up, neither can be deprived of the benefit thereof by assignment by the other, but the two demands must be deemed compensated, so far as they equal each other": Rev. Stats., sec. 5077. By force of the statute the indebtedness of the bank to Schlegel was paid by a corresponding amount of the indebtedness of Schlegel to the bank; and crediting Schlegel's note with the amount due on his deposit account, as was done by the bank, was but giving effect to the provisions of the statute.

It is said to be a well-settled rule of the law merchant that a bank has a general lien on all the funds of a depositor in its possession, for any balance due on general account, or other indebtedness contracted in the course of their dealings, and may appropriate the funds to the payment of such indebtedness. The right to make such appropriation, it is held, grows out of the relation of the parties as debtor and creditor, and rests upon the principle that "as the depositor is indebted to the bank upon a demand which is due, the [159] funds in its possession may properly and justly be applied in payment of such debt, and it has, therefore, a right to retain such funds until payment is actually made": *Falkland* v. *St. Nicholas Nat. Bank*, 84 N. Y. 145. Though this right is called a lien strictly it is not, when applied to a general deposit; for a person cannot have a lien upon his own property, but only on that of another; and, as we have seen, the funds on general deposit in a bank are the property of the bank. Properly speaking, the right, in such case, is that of setoff, arising from the existence of mutual demands. The practical effect, however, is the same. The cross demands are satisfied so far as they are equal, leaving whatever balance that may be due on either, as the true amount of the indebtedness from the one party to the other. Aside, then from any question as to whether the plaintiff could maintain its action on the check without acceptance of it by the bank, the petition fails to make a case against the defendant. True, the petition does not allege that the deposit made by Schlegel in the defendant bank was a general one; but it is presumed to be such, unless it otherwise appear; and there is nothing in the petition from which it may be inferred that the deposit was special, or made under any particular agree-

ment or direction. It is also true, the petition avers, that when the plaintiff presented the check for payment the drawer had sufficient funds in the bank for its payment; but it is alleged that the bank held the past due paper of Schlegel, for an amount exceeding his deposit, and had applied the whole amount due him in payment of the paper, before the presentation of the check. It is not important that the application was made without the plaintiff's consent; such consent was not necessary to give validity to the application, and if it were, the want of it would not entitle the plaintiff to recover, for the right to have the claims set off would still exist.

The judgments of the circuit court and court of common pleas are reversed, and cause remanded, with instructions to sustain the demurrer to the petition, and for further proceedings.

CHECK, WHETHER ASSIGNMENT OF FUND.—A check for a part of the sum due the drawer does not, before its acceptance, constitute an assignment of the amount drawn: *Covert* v. *Rhodes*, 48 Ohio St. 66; *Maginn* v. *Dollar Sav. Bank*, 131 Pa. St. 362; *Chapman* v. *White*, 6 N. Y. 412; 57 Am. Dec. 464, and note. This subject will be found thoroughly treated in the extended notes to *Hemphill* v. *Yerkes*, 19 Am. St. Rep. 609; *Saylor* v. *Bushong*, 45 Am. Rep. 355; *Sowden* v. *Craig*, 96 Am. Dec. 132, and *In re Franklin Bank*, 19 Am. Dec. 422.

BANKS—GENERAL DEPOSITS—RELATION OF BANK AND DEPOSITOR.—General deposits become the property of the bank and may be employed in its business: *In re Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413, and note; and establish the relation of debtor and creditor between the bank and the depositor: *Grissom* v. *Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669, and note; *Hawes* v. *Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870, and note; *Shipman* v. *Bank*, 126 N. Y. 318; 22 Am. St. Rep. 821, and note; *Lynch* v. *First Nat. Bank*, 107 N. Y. 179; 1 Am. St. Rep. 803, and note; *Janin* v. *London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note, with the cases collected. See, also, the notes to *Chapman* v. *White*, 57 Am. Dec. 466, and *National Bank* v. *Second Nat. Bank*, 35 Am. Rep. 238.

BANKS—APPLYING DEPOSITS TO PAYMENT OF NOTE.—When a bank becomes the holder of a note for value in the ordinary course of business, it may appropriate funds in its hands belonging to any previous party to the note to its payment, when payment is not made at the time and place named; as to the maker, it is bound to do so: *Mechanics' etc. Bank* v. *Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853, and note. This question is discussed in the extended note to *National Bank* v. *Smith*, 23 Am. Rep. 50.

BANKS—PRESUMPTION THAT DEPOSITS ARE GENERAL: See the extended note to *In re Franklin Bank*, 19 Am. Dec. 418.

EVANS *v.* BEAVER.

[30 OHIO STATE, 190.]

CONFLICT OF LAWS.—A MORTGAGE MADE IN INDIANA BY AND BETWEEN RESIDENTS THEREOF UPON PROPERTY SITUATE IN OHIO is an Indiana contract, and if invalid by the laws of that state, because one of the parties was without capacity to make it, cannot be enforced in Ohio.

Henry Newbegin and B. B. Kingsbury, for the plaintiff in error.

N. G. Johnston, Harris and Cameron, C. S. Bentley, and Hill and Hubbard, for the defendants in error.

191 THE COURT. May H. Webb was not originally liable upon the notes; but her husband assumed their payment, and she, as his surety, pledged her separate estate to secure that obligation. It is well settled that a mortgage is only a security for the performance of some obligation, and if that is void it is of no avail. All the parties to the notes as well as to the mortgage resided at the time in the state of Indiana, and performance, that is to say, payment, was to be made in that state. It was in every sense an Indiana contract; and, as to the capacity of the parties to make it, must be governed by the laws of that state: Story on Conflict of Laws, secs. 65–66 *a*, pp. 242, 243; *Lockwood* v. *Mitchell*, 7 Ohio St. 388, 405; 70 Am. Dec. 78; Wharton on Conflict of Laws, secs. 398–400. By the laws of that state a married woman is incapable of making a contract binding her as surety or guarantor in any form; it is declared void. Hence, though a married woman is under no such disability in this state, yet the mortgage of May H. Webb, having been executed in the state of Indiana, where she was then domiciled, to secure an obligation to be performed in that state, and by whose laws she had no capacity to make it, is void here as well as in that state.

Judgment affirmed.

MORTGAGES—CONFLICT OF LAWS.—A mortgage executed in New York, the money advanced there, and the note and mortgage delivered there, is a New York contract, and governed by its laws, though the land upon which the mortgage is given is situated in Ohio: *Lockwood* v. *Mitchell*, 7 Ohio, 387; 70 Am. Dec. 78. A mortgage to a bank of a sister state of lands in Kentucky is valid, and will be upheld by its laws: *Lathrop* v. *Commercial Bank*, 8 Dana, 114; 33 Am. Dec. 481.

CONFLICT OF LAWS.—THE LAW OF THE PLACE where a contract is executed governs in determining its validity: *Falls* v. *United States etc. Building Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; *Armstrong* v. *Best*, 112 N. C. 59; 34 Am. St. Rep. 473, and note. See, also, the extended note to *Graves* v. *Johnson*, 32 Am. St. Rep. 450.

WOOLWEAVER *v.* STATE.

[50 OHIO STATE, 277.]

HOMICIDE, AIDING AND ABETTING.—In the absence of a conspiracy, one who is present when a homicide is committed by another, upon a sudden quarrel or in the heat of passion, is not guilty of aiding or abetting the homicide, although he may be involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act.

C. H. Grosvenor and J. M. McGillivray, for the plaintiff in error.

James W. Darby, O. W. H. Wright, and R. S. Swepston, for the defendant in error.

286 BRADBURY, C. J. Upon the trial of this cause the plaintiff in error excepted to a number of rulings made by the trial court, only one of which we think merits consideration here, namely: the exception taken to the refusal of the court to give to the jury that proposition of law requested by plaintiff in error, which relates to the proof necessary to constitute one an aider and abettor of a homicide occurring upon a sudden quarrel, where the proof is insufficient to establish a prior conspiracy.

Over many of the circumstances that occurred on the day of the homicide, and which led up to it, there seems to have been no substantial controversy. The record discloses that the plaintiff in error resided and kept a saloon at McArthur Junction, a small village located where the track of the Columbus, Hocking Valley, and Toledo Railway Company and that of the Baltimore and Ohio Southwestern Railroad Company cross each other; that George T. Ewing was the station agent there; that mutual enmity existed between Ewing and the plaintiff in error; that the saloon of plaintiff in error was situated a hundred feet or more from the station buildings; that the plaintiff in error, in the early part of the day of the homicide, was intoxicated, and continued in that condition until after the homicide occurred, which happened near the middle of the afternoon; that Ewing was absent from the station most of the day until about one o'clock, when he returned; and that during his absence the plaintiff in error came up about the platform and station building, exhibiting special ill-will towards Ewing, and one or two other employees about the station, and ill-will generally towards the rest of them,

applying to him and to them vile and abusive epithets, though exhibiting no ill feeling toward the deceased personally.

287 So far as the record discloses, the plaintiff in error had become quiet before the return of Ewing, though for how long before is left uncertain. Ewing, after his return, though how long thereafter is not made quite clear, walked along the station platform to a point nearly opposite the saloon of plaintiff in error, where he and the latter engaged in a quarrel, on the termination of which the plaintiff in error seems to have entered his saloon while Ewing returned to his office. A short interval, fixed by one witness at one hour and twenty minutes, occurred now, during which little, if any thing, transpired, unless the plaintiff in error may have occasionally indulged in boisterous language addressed to no one in particular. At the expiration of this period he started from his residence or saloon towards the station with a ginger-ale bottle in his hand; he came near the deceased, and they engaged in a sharp and short quarrel, which resulted in the deceased going to the railroad office, getting Ewing's revolver, and starting to return towards the plaintiff in error; Ewing and Lyons, another employee about the station, took the revolver from the deceased, and all three moved in the direction of the plaintiff in error, who about this time was joined by his two sons and his wife; an encounter followed in which Henry Woolweaver, a son of the plaintiff in error, shot and killed the deceased. There were many other circumstances and facts over and about which the parties contested, and which for that reason are unnoticed in the general statement of what seems not to have been controverted.

The plaintiff in error did not fire the fatal shot, and, therefore, if a party to the homicide, became such either because of a prior conspiracy, that made him a party to the act of his son, by reason of inciting or encouraging his son at the time of its commission, or by some overt act of his own, designed or done with a view to bring about that result.

The proposition requested, and which the court declined to give to the jury, reads as follows: "In the absence of a conspiracy, one who is present when a homicide is committed 288 by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely

incites or encourages the principal to do the act; and so in this case, if you find the defendant on trial, although present at the time of the shooting, knew nothing of his son Henry having a revolver, or intending to shoot, and took no part in the killing, and did no overt act to produce that result, then he is in no way responsible, and must be acquitted, unless you find from the evidence, and beyond a reasonable doubt, that the shot was fired by Henry in pursuance of a conspiracy previously formed by them."

This proposition the court modified by erasing the words "with a view," and inserting in their place the word "tending," so as to make it read "unless he does some overt act tending to produce that result," and gave it to the jury as thus modified. If there was no prior conspiracy, and the act was committed upon a sudden quarrel, without the plaintiff in error having purposely incited or encouraged the perpetrator thereof, he ought not to be held to have a guilty connection therewith, unless he did some overt act "with a view"—that is, for the purpose—to produce the result he is charged with aiding and abetting, for in such a state of fact no criminal intent would exist. But, under the rule of law embraced in this proposition, as modified and given to the jury, the plaintiff in error might have been convicted without proof of a guilty purpose, and when he had a casual connection only with the homicide; for it authorized a verdict of guilty if he did any overt act that tended in any degree to cause the death of the deceased, although the act was done by him without any purpose to cause that result, and in fact did not produce it; and although there was neither a previous guilty conspiracy, nor any incitement or encouragement purposely given by him, at the time, to the actual perpetrator of the homicide.

[289] Whenever a father engages in a fight the tendency of that act is to incite a son, who may be standing by, to acts of violence, either towards the immediate antagonist of the father, should there be but one, or towards the party of that antagonist if there should be more than one; this tendency may be affirmed in respect to many other ties of kindred, or in many instances of merely close companionship. What rash or violent act the bystanding son, kinsman, or comrade may be moved to do, depends in a great measure upon the quality of his temper, the strength of his affection, and the notion, often mistaken, that he may hastily gather under

the excitement of the moment, as to who is in fault and to be held responsible for bringing on the conflict. And if the bystanding son, other kinsman, or comrade, should, of his own volition, by an independent act of violence, slay the antagonist, the party engaged in the fight should not be charged with this act merely because he was engaged in a conflict with the deceased, and in that way, but in that way only, incited the fatal act. This is not enough to show a criminal intention; something more must appear; he must have purposely incited or encouraged the party in that course of violence that led to the homicide, or done some overt act himself, with a view to that result, and that in some degree contributed thereto. This is the principle that underlies the eighth clause of the *syllabus* in the case of *Goins* v. *State*, 46 Ohio St. 457.

True, in *Goins* v. *State*, 46 Ohio St. 457, the plaintiff in error, at the moment of the killing, was engaged in an independent struggle with a person other than the one who was killed, but Goins was of the party with the one who gave the fatal stab, and his immediate antagonist was of the party of the one who received the death wound. In the case under consideration, there was evidence tending to show that the plaintiff in error and his two sons composed one party, while the deceased and Mr. Ewing, and probably Mr. Lyons, composed the other party. This difference in the circumstances in no wise affected the principles by which the criminal character of the acts of the parties should be tested. If there was a conspiracy, each conspirator was chargeable with [290] the acts of his co-conspirators; if there was no conspiracy, then, upon the springing up of a sudden fight, each should be chargeable only with his own acts, and such acts of the others as he may purposely incite or encourage. The charge in the form in which it was requested correctly stated this proposition.

Where satisfactory proof of a conspiracy has not been produced it often becomes a nice and difficult matter to determine the criminal liability of each of a party of friends or kindred for the violent and unlawful acts of his fellows, committed in the course of a conflict, arising upon a sudden quarrel, with one or more antagonists; and in such case, upon the trial of one of them, it is of the first importance that the correct rule of liability should be laid down to the jury; and if the instructions should extend too far the liability of the

one on trial for the acts of his fellows, it would be, necessarily, prejudicial to his rights. Therefore, as the proposition, in the form requested by the plaintiff in error, prescribed the correct rule of liability in the absence of proof of a conspiracy, it should have been given to the jury, and any modification that extended the liability, as thus prescribed, must be regarded as erroneous.

Judgment reversed.

ACCESSORIES—WHETHER MERE PRESENCE AT COMMISSION OF CRIME CONSTITUTES.—One is not guilty of aiding and abetting in the commission of a crime merely because he is present and sees that it is about to be committed, and does not in any manner interfere. To make him an aider and abettor he must do or say something showing his consent to the felonious purpose and contributing to its execution: *State* v. *Hildreth*, 9 Ired. 440; 51 Am. Dec. 369, and extended note; *Connaughty* v. *State*, 1 Wis. 159; 60 Am. Dec. 370. It requires more than the bare presence of a party at the time and place of the commission of an offense to constitute him a principal offender. There must in some way be an acting together with the person who commits the crime: *Floyd* v. *State*, 29 Tex. App. 349; *Sharp* v. *State*, 29 Tex. App. 211. Mere knowledge that an offense is being committed, and the concealment of such knowledge, does not constitute a party an accomplice who does not participate in the commission of the crime: *Alford* v. *State*, 31 Tex. App. 299. See *State* v. *Furney*, 41 Kan. 115; 13 Am. St. Rep. 262, where it was held that murder committed by one of several conspirators without the knowledge and consent of the others, where the act is not the probable outcome of the common design, but the independent act of one conspirator, those not participating in it are not guilty of murder: See, also, the notes to *People* v. *Woodward*, 13 Am. Rep. 177, and *Harrel* v. *State*, 80 Am. Dec. 97.

BONEWITZ *v.* BONEWITZ.

[50 OHIO STATE, 273.]

JURY TRIAL, WAIVER OF.—If the parties, being present in court, submit their cause to the court upon the pleadings, evidence, and arguments of counsel, and these acts are entered upon the journal, they thereby waive a trial by jury, though the statute declares that trial by jury may be waived: 1. By the consent of the party appearing, when the other party fails to appear; 2. By written consent filed with the clerk; or 3. By oral consent in open court entered on the journal.

G. M. Saltzgaber, for the plaintiff in error.

H. G. Richie, for the defendant in error.

276 SPEAR, J. The ground of error alleged in the circuit court was that the common pleas erred in proceeding to trial without the intervention of a jury.

To sustain the judgment of the common pleas it must appear either that a jury was waived, or that the issues were such that the cause could of right be tried by the court without a jury.

Section 5130 of the Revised Statutes provides that "issues of fact arising in actions for the recovery of money only, ... shall be tried by a jury, unless a jury trial be waived," etc. And by section 5204 it is provided that in actions arising on contract, trial by jury may be waived: 1. By consent of the party appearing when the other party fails to appear; 2. By written consent filed with the clerk; or 3. By oral consent in open court, entered on the journal.

It is insisted by counsel for plaintiff in error that the record shows affirmatively there was a waiver of a jury trial, while opposite counsel contend that the journal entry not only fails to show there was a waiver, but does affirmatively show that a jury was not waived.

The language of the entry is that "neither party demanded or waived the intervention of a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and argument of counsel." There is apparent verbal contradiction in the entry, and the question is, What, taken as a whole, does the language import? Upon the whole case made, was there a waiver or not? Attention is called to the case of *Slocum* v. *Swan*, 4 Ohio St. 161, as settling the question in this case. Plaintiff's action was in ejectment. A plea of "not guilty" had been interposed. When the case was reached the defendant [377] came not, although called, and the court rendered judgment for plaintiff without a jury, and, apparently, without proof. The statute then in force provided that "when the parties to such action shall agree to waive the intervention of a jury, and to submit the case to the court it shall be the duty of such court to try and determine the facts," etc. Under such a statute, and upon such a record, this court held that the issue made could not be tried by the court without a waiver by the parties of a jury trial; that there was no such waiver, and reversed the judgment. The real question was hardly germane to our case. It was whether or not the absence of the defendant amounted to a waiver. The holding on that question cannot materially aid in the solution of the question here presented, much less settle it.

We have examined the other cases cited by defendant's counsel, but do not find them applicable to the present facts.

As already observed, the statute indicates several methods of showing waiver. Where the parties are present (as in this case) there must be consent, and, if it be oral, it must be given in open court, and entered on the journal. When this sufficiently appears there is, in law, a waiver. Does not just that thing appear here? We think it does. The parties were present. Without objection they "submitted the cause to the court upon the pleadings, evidence, and arguments of counsel." This means a trial of the cause. It means, also, that the parties consented to go forward and try the cause to the court, and their acts, in this regard, were entered on the journal.

To submit a cause to a court is an affirmative act. It is to ask the court to hear the evidence, consider it, and apply the law. What more potent "consent" could be given than this? A jury was not demanded because, in all probability, the counsel and the court alike regarded it as a court, and not a jury, case. True, the entry says that neither party waived a jury. This language, in the light of the entire entry, naturally means, we think, and should be held to mean, no more than that no waiver was made in *any* words. And it is true that none was so made, but actions sometimes speak louder than words.

It was not until after the court had found and adjudged against the defendant that he discovered he had been prejudiced by not having his cause tried to a jury. His objection to the mode of trial, we think, comes too late. To sustain his claim would seem to be trifling with justice. He proceeded to trial, without objection, to a court having jurisdiction of the parties, and capable of being clothed with jurisdiction of the subject matter for all purposes, taking his chance of a favorable result, and cannot, now that the chance has turned against him, be heard to question the authority of the tribunal to which he consented to submit his cause. He must be held to have waived his right to a jury trial, if he had such right: *Nicholson* v. *Pim*, 5 Ohio St. 25; *Ellithrope* v. *Buck*, 17 Ohio St. 72; *Averill Coal etc. Co.* v. *Verner*, 22 Ohio St. 372; *Miller* v. *Longacre*, 26 Ohio St. 291; *Culver* v. *Rodgers*, 33 Ohio St. 537.

We think it was not error for the trial court to assume jurisdiction and try the issues. And as this holding disposes of the case, it is not important to consider whether, as a

matter of law, either party had the right, under the pleadings, to demand a jury.

The judgment of the circuit court will be reversed, and that of the common pleas affirmed.

JURY TRIAL IN CIVIL CASES.—WAIVER OF: See the note to *Flint River Steamboat Co.* v. *Roberts*, 48 Am. Dec. 194. A jury trial may be waived, being a mere constitutional privilege: *Flint River Steamboat Co.* v. *Foster*, 5 Ga. 194; 48 Am. Dec. 248. An agreement that the pending action shall abide the result in another case, entered on the docket, binds the parties to it, and the defendant by entering into such an agreement waives his right to a trial by jury to determine the damages: *Cummings* v. *Smith*, 50 Me. 568; 79 Am. Dec. 629, and note.

NEININGER *v.* STATE.

[50 OHIO STATE, 394.]

SURETYSHIP, REFORMATION OF CONTRACT OF.—A written instrument which by mistake fails to express the agreement of the parties may be reformed, and then enforced against a surety. Hence, if in a prosecution by Margie C., sureties are offered that the accused will appear and answer such accusation, but the undertaking which they execute is by mistake so drawn that it declares that they will appear and answer the accusation of Margie K., such undertaking may be reformed and enforced in an action against the sureties.

RECOGNIZANCE, WHEN MAY BE DECLARED FORFEITED.—A recognizance conditioned that the accused shall appear and answer an accusation made against him and abide the order of the court, given under a statute declaring that if the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited, the forfeiture may be made at any time during the term and after, as well as before, a verdict against him.

James M. Rees and N. K. Kennon, for the plaintiffs in error.

R. J. Alexander and J. C. Heinlein, for the defendant in error.

396 WILLIAMS, J. The principal question presented is, whether a written instrument, which, by mistake, fails to express the agreement of the parties, may be reformed, and then enforced against a surety. The plaintiffs in error contend that it cannot; and, for that reason, they claim the court of common pleas erred in overruling their demurrer to the amended petition, and awarding the relief it demanded against them.

This court, in a number of decisions, has strictly adhered to the rule that the liability of a surety cannot be extended

by implication beyond the terms of his contract. In *State* v. *Medary*, 17 Ohio, 554, it was held that the sureties on a bond conditioned for the faithful performance by the principal of his duties as a member of the board of public works, were not liable for his defalcation as an acting commissioner under the appointment of the board.

400 In *McGovney* v. *State*, 20 Ohio, 93, which was an action at law on an executor's bond, conditioned for the faithful administration of the estate of James Findley, the court held that the sureties were not liable for the maladministration by the executor named of the estate of Joseph Findley; and that the bond could not, by parol evidence, be made applicable to the estate of Joseph Findley. It was decided in the case of *Myres* v. *Parker*, 6 Ohio St. 501, that an appeal bond, which recited that the appellant had taken an appeal from the judgment of the court of common pleas to the supreme court of the county, and the condition of which was that he would pay the amount of the condemnation money in the supreme court, in case a decree should be entered therein in favor of the appellee, did not bind the sureties for the payment of a judgment of the district court, which, at the date of the bond, had superseded the supreme court. In neither of these cases, however, was the reformation of the written instrument sought, nor were the allegations necessary to entitle the parties to that remedy, made by the pleadings. The same may be said of all the cases cited by counsel for the plaintiffs in error. We have been unable to find any reported decision in which the question here presented has received the consideration of this court.

It is well settled that written contracts, and other instruments of writing, may be reformed, when, through fraud or mistake, they fail to express the actual agreement and intention of the parties; and that the fraud, or mistake, may be established by parol evidence. That doctrine has been fully maintained in numerous cases in this state. The remedy has been administered even where the mistake was in the legal effect of the terms of the instrument; and, but for the statute of frauds, there would appear to be no reason why the contracts of sureties should not be subject to the remedy, the same as other written instruments. The obligation of the surety rests upon a consideration as adequate as that of the principal; for, though he receive no pecuniary or other benefit for his undertaking, credit is extended to

the principal, and advantages are obtained by him, upon [401] the faith of the surety's engagement. But, as the statute requires a promise to answer for the debt or default of another to be in writing, and signed by the party to be charged therewith in order to be binding, it is contended that, to permit the writing to be reformed in any material part upon parol proof of a mistake, would in effect be to establish a verbal contract, and make it obligatory upon the surety, contrary to the provisions of the statute. If that is a valid objection to the reformation of a contract executed by a surety it must be equally so to the reformation of any other contract embraced in the statute of frauds; for it is obvious the objection applies with equal force to all contracts that are within its provisions. The statute is not less explicit in its requirement that contracts for the conveyance of any interest in lands shall be in writing, and signed by the party, than it is that those of a surety or guarantor shall be of that character. Indeed, it is expressed as to both classes of contracts, in the same language, and in the same section. And, if those of either class cannot be reformed on account of the statute, it follows that those of the other cannot; but, if either may be, then so may the other. The statute presents no greater or different obstacle in the one case than in the other. It has long been the settled law of this state that contracts concerning lands, and even deeds and mortgages by which they have been conveyed, may be reformed, on the ground of mistake and upon parol proof, by correcting misdescriptions, including lands omitted by mistake, enlarging or restricting the character of the estate, inserting or qualifying covenants and conditions, and in other respects. In *Davenport* v. *Sovil*, 6 Ohio St. 459, it was held that a mortgage might be reformed so as to include land not described in it, and then enforced against the same. In the case of *Clayton* v. *Freet*, 10 Ohio St. 545, a deed which conveyed an estate in fee simple was so reformed as to convey a life estate to the grantee, with remainder to her children. And a deed, defective for want of an acknowledgment, was reformed by enlarging a life estate into a fee simple, and a conveyance decreed accordingly, in the case of *Ormsby* v. *Longworth*, 11 Ohio St. 653. Other [402] instances in which like relief has been awarded may be found in *Hunt* v. *Freeman*, 1 Ohio, 490; *Evants* v. *Strode*, 11 Ohio, 480; 38 Am. Dec. 744; *Webster* v. *Harris*, 16 Ohio, 490.

With respect to the reformation of contracts within the statute of frauds, Mr. Pomeroy, in section 866, of his work on Equity Jurisprudence, says: "The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject matter which had been omitted through fraud or mistake; and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing. This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principle of equity jurisprudence." In Story's Equity, section 164, the rule is broadly stated, that equity will administer the remedy of reformation, "on the ground of mistake," as fully against a surety or guarantor, as against the principal party. And such is the current of authority. In *Wiser* v. *Blachly*, 1 John. Ch. 607, it was held that "when the intention is manifest, this court will always relieve against mistakes in agreements, and that as well in the case of a surety as in any other case." There a guardian's bond, payable to the people, was corrected to run to the ward. In the case of *Olmsted* v. *Olmsted*, 38 Conn. 309, the court held that, "when the contract of a surety does not express the agreement or intention of the parties, to the injury of the obligee, and that is clearly made to appear, equity will reform the instrument, as well against the sureties as the principal." It has been decided by the supreme court of Missouri, that "courts may reform bonds, both as against the principals and sureties. But to authorize such step the evidence 403 must be unequivocal to show the existence of the mistake and its precise character": *State* v. *Frank*, 51 Mo. 98. And to the same effect are many cases. Among them, *Smith* v. *Allen*, 1 N. J. Eq. 43; 21 Am. Dec. 33; *Armistead* v. *Bozman*, 1 Ired. Eq. 117; *Sikes* v. *Truitt*, 4 Jones Eq. 361; *Butler* v. *Durham*, 3 Ired. Eq. 589; *Huson* v. *Pitman*, 2 Hayw. 504, 331*;

Clute v. *Knies*, 102 N. Y. 377; *Prior* v. *Williams*, 3 Abb. App. Dec. 624; Brandt on Suretyship, sec. 141.

After a careful and somewhat extended examination of the question, we have arrived at the conclusion that a written instrument executed by a surety, which, by mistake, fails to express the actual agreement and intention of the parties, may be reformed, upon parol proof, like other written instruments, and then enforced against the surety. But the evidence must be of that clear and convincing character which leaves no reasonable doubt, either of the mistake or the terms of the agreement.

The plaintiffs in error further claim that their demurrer to the amended petition should have been sustained, because, its averments show that the recognizance was not legally forfeited, the forfeiture not having been made until after the verdict. The recognizance was conditioned, as the statute requires that the accused should appear and answer the accusation made against him, and abide the order of the court. The provision of the statute is, that "if the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited." The verdict was rendered, and judgment entered at the term to which the accused was bound to appear, and we see no reason why the forfeiture could not be made any time during the term. The important condition of the recognizance is, that the accused shall abide the order of the court. When that is performed, its purpose is substantially accomplished, and his appearance is material only to enable the court to enforce its judgment against him, by committing him, as the statute provides, upon his failure to furnish security for the sum he is adjudged to pay for the maintenance of the child. If he appear and defend at the trial, but fail to appear and perform the judgment of the court, there is a breach of the recognizance for 404 which it may be forfeited; and that breach can only occur after trial and verdict. We think, therefore, that the objection urged by the plaintiff in error to the forfeiture of the recognizance is not a valid one.

It is also contended that the court erred in requiring the plaintiffs in error to go to the trial too soon after the amended petition was filed. It was filed, as the record shows, on the first day of December, 1888, and, against their objection, the cause was set for trial on the eighth day of the same month. Their claim is, that they were entitled to the same time in

which to answer the amended petition that is allowed by law for answer to an original petition which, it is claimed, gave them until and including the third Saturday after the pleading was filed for answer; and especially should they have been allowed that rule, it is said, because no other time for answer was fixed by the court. The court is authorized to permit amendments of pleadings before or after judgment in furtherance of justice, on such terms as may be proper, "by inserting other allegations material to the case," and in many other respects: Rev. Stats., sec. 5114. An amended petition, which contains all or part of the allegations of the original petition, with others that are material, is a form of amendment permitted by the statute, and a mode often adopted; and as the statute has prescribed no rule day for answer to such a pleading, nor to an amendment in any form, the time within which an answer may be filed to a pleading of that kind is within the discretion of the court. Where no other time is fixed by the court, setting the case for trial on a specified day is, in effect, an order that the issues be made up by that time; and it appears they were made up in this case before the trial commenced.

Judgment affirmed.

EQUITY—REFORMATION OF CONTRACTS.—Equity will reform an instrument which, by reason of a mistake, fails to execute the intention of the parties: *Leitensdorfer* v. *Delphy*, 15 Mo. 160; 55 Am. Dec. 137, and note; *Smith* v. *Jordan*, 13 Minn. 264; 97 Am. Dec. 232, and note; *Evants* v. *Strode*, 11 Ohio, 480; 38 Am. Dec. 744, and note; *Chapman* v. *Allen*, Kirby, 399; 1 Am. Dec. 24; *Coger* v. *McGee*, 2 Bibb, 321; 5 Am. Dec. 610. See note to *Hecht* v. *Batcheller*, 9 Am. St. Rep. 712.

CONRAD *v.* EVERICH.

[50 OHIO STATE, 476.]

JUDGMENT FOR ALIMONY—LIEN OF.—If in a final decree of divorce a wife is awarded a gross sum as alimony, such sum is a lien upon the husband's real property, if by the statute of the state every final determination of the rights of the parties is declared to be a judgment, and every judgment to be a lien upon the lands and tenements of the debtor in the county wherein the judgment is entered.

A JUDGMENT FOR ALIMONY IS A DEBT OF RECORD as much as any other judgment for money is.

Charles A. Beard, for the plaintiff in error.

W. H. Ball, for the defendants in error.

[476] DICKMAN, J. The original action was commenced in the court of common pleas of Muskingum county, by the [477] plaintiff, Minerva Conrad, against the defendants, Sarah E. Everich and W. H. Bolin, as sheriff of that county. The object of the suit was to enjoin the sale under execution of certain lands and tenements in Zanesville, Ohio, described in the plaintiff's petition, which had been levied upon by the sheriff, to satisfy a claim for alimony in favor of Sarah E. Everich. As disclosed by the record, the undisputed facts that give rise to the only question before us for determination are as follows:

At the January term, 1889, of the court of common pleas of Muskingum county, Sarah E. Everich obtained a divorce from her husband, James S. Everich, in an action for divorce and alimony, wherein the court, having ordered the delivery to her of certain articles of personal property of which she was the owner, further ordered, adjudged, and decreed that James S. Everich pay to her additional alimony in the sum of one thousand dollars, and in default of such payment within five days thereafter, that execution issue therefor; and further, that he pay the taxed costs of the action, and that execution issue therefor in default of payment. Neither the petition in the action nor the decree for alimony, described, mentioned, or referred to any lands or tenements; and the decree for alimony was simply for the gross sum of one thousand dollars in money, and was not, by its terms, made a charge upon any real estate.

On March 14, 1889, Mrs. Everich caused an execution to be issued against the property of James S. Everich, to satisfy the judgment for alimony and costs, and the same was levied by the defendant, W. H. Bolin, as sheriff, upon certain personal property, but no levy thereof was made on any lands and tenements, and the same was duly returned into the office of the clerk of the court on May 4, 1889. The personalty levied on was sold for forty-eight dollars and twenty cents, for which a credit was given on the execution; and on August 1, 1889, a second execution was issued, and levied on the lands and tenements described in the petition, which the sheriff caused to be appraised and duly advertised and offered for sale.

On the tenth day of July, 1889, the plaintiff, being fully informed of the decree for divorce rendered at the January [478] term, 1889, of the court of common pleas, purchased the

lands and tenements so levied on from James S. Everich, who, on that day, conveyed to her in fee simple the purchased premises.

At the time of the purchase of the property there was a mortgage thereon which had been executed by James S. Everich and Sarah E. Everich when husband and wife; and by the terms of the contract of purchase the plaintiff was to assume the payment of that mortgage as part of the consideration of the conveyance to her. A release of the mortgage was accordingly obtained, by the plaintiff executing with her husband to the mortgagee a new mortgage on the property for the amount originally secured.

As prayed for in the plaintiff's petition the court of common pleas perpetually enjoined the defendants from selling or offering for sale, by virtue of the judgment for alimony, the lands and tenements levied on and advertised for sale under execution.

On petition in error by Sarah E. Everich the circuit court reversed the judgment of the court of common pleas, and remanded the cause for a new trial. By this proceeding in error the plaintiff, Minerva Conrad, seeks to reverse the judgment of the circuit court.

Upon the facts as thus stated the question is presented, whether the judgment in favor of Mrs. Everich for one thousand dollars in gross, as alimony, was *per se* a lien on the lands of James S. Everich in Muskingum county. If such lien was thereby created, the claim for alimony must take precedence of any rights under the deed executed to the plaintiff subsequently to the rendition of the judgment.

It is urged in behalf of the plaintiff that in *Olin* v. *Hungerford*, 10 Ohio, 268, decided in 1840, it was held that a decree for alimony, to be paid in installments, does not operate as a lien upon the real estate of the defendant unless made a charge thereon by the decree itself. The decree in question in that case was rendered in 1831, and its effect was determined in accordance with the statute in force at the time of its rendition. By the act then in operation, the court in their discretion might grant alimony, [479] where the evidence justified such decree: 2 Chase's Comp. Stats. 1409.. The statute did not make the decree a lien on real estate; nor was the effect of the decree, as to alimony, declared; nor was the mode of enforcing its payment designated. But the power to grant alimony having

been conferred, some mode of enforcing its payment incidentally followed. And the court, while adopting the practice of enforcing collection by execution, considered it an exercise of legitimate power to make its decree a charge upon real estate, and such had been its practice in cases where it was deemed proper. It is true that, by section 7 of the act of March 14, 1831, "directing the mode of proceeding in chancery" (3 Chase's Comp. Stats. 1692), it was provided that "decrees in chancery shall, from the time of their being pronounced, have the force, operation, and effect of a judgment at law." But the court, in the above-cited case, did not recognize a sufficient analogy to hold that a decree in a divorce case, which allows alimony to the wife, and which is a statutory proceeding throughout, is in the nature of a decree in chancery; and was of the opinion that there could be no more propriety in calling the proceedings in a divorce case proceedings in chancery than there would be in calling proceedings for the partition of real estate, under the statute regulating that subject, proceedings in chancery. By the amendatory act, however, concerning divorce and alimony, passed March 1, 1834 (32 Ohio Laws, 37), it was enacted "that all proceedings in cases of divorce shall be as in chancery." But the court, in *Olin* v. *Hungerford*, 10 Ohio, 268, did not regard this statute as fixing the force and effect of decrees in cases of divorce, but only as providing the proceedings in order to arrive at such decrees. And hence, in delivering the opinion, the court uses the language: "Even under this statute, should we hold that a decree for a gross sum to be paid the wife would operate as a lien, it does not follow that the same principle would hold where, as in the present case, it was for the payment of specified sums annually during the joint lives of the parties." It is manifest, therefore, that the court did not pass upon the question now before [480] us, whether a decree for alimony payable in gross operates as a lien upon the lands of the husband in the county where it is rendered; but, as involving a difference of principle, the court signified that in respect to being a lien upon real estate, a distinction might be drawn between a decree for alimony payable in gross and a decree payable in installments.

In *Kurtz* v. *Kurtz*, 38 Ark. 119, the court speaks of the embarrassment and inconvenience incurred by making future payments of alimony a lien upon real estate as too obvious for discussion; but remarks that, "as for all sums ordered to

be paid at once, and for which execution may issue, they are already general liens, without being so expressed." As, in our view, a decree for a gross sum to be paid the wife for alimony would, in itself, operate as a lien, we do not think it necessary to inquire how far a decree for alimony payable in installments is thereby obviously distinguishable in regard to its operative effect as a lien upon real estate.

By the adoption of the Code of Civil Procedure the distinction between actions at law and suits in equity and the forms of all such actions and suits theretofore existing were abolished, and in their place but one form of action, called a civil action, was instituted. Prior to the adoption of the code, judgments at law and decrees in chancery were made liens by statute on the lands of the debtor in the county. But the final determination of the rights of the parties in action is now denominated a judgment; and a lien of judgment attaches to the lands and tenements of the debtor, within the county where the judgment is entered, from the first day of the term at which judgment is rendered: Rev. Stats., secs. 5310, 5375. This definition of a judgment is broad enough to comprise all final judgments and all final decrees. Within the meaning of the statute, a final determination of the rights of the parties in an action for divorce and alimony, in which a sum in gross is ordered to be paid as alimony, is, in its nature, a judgment; and if so, we discover no good reason why it should not become a lien upon lands as other judgments. In section 5697 of the Revised Statutes the award [481] of alimony is designated a "judgment." It is enacted by section 5703 that the court shall, on petition for alimony, ... "give judgment in favor of the wife for such alimony out of her husband's real and personal property as is just and equitable, which may be allowed to her in real or personal property, or both, or in money, payable either in gross or in installments." The statute thus, to all intents and purposes, authorizes a money judgment as and for alimony, with the same force and effect, in itself, as any other judgment for the payment of money.

It is contended in argument that alimony is not a debt, and if not, that it is difficult to see how it is a lien, unless expressly made so by the court. But, in *Lockwood* v. *Krum*, 34 Ohio St. 1, it is well said by Boynton, J., in delivering the opinion of the court: "The claim for alimony rests on the common-law obligation of the husband to support the wife in

a manner suitable to his condition and station in life during the existence of the marriage relation. And this obligation is as binding after the commission, by the husband, of a marital offense entitling the wife to a divorce, as before. In respect to such obligations she may well be held to be a creditor of the husband." In *Chase* v. *Chase*, 105 Mass. 385, it was held that a judgment for alimony in the case of a divorce *a vinculo*, or from bed and board, creates a debt of record in favor of the wife, and that she is entitled, as a creditor, to impeach a conveyance made by him with intent to defraud her. It is said by the supreme court of the United States in *Barber* v. *Barber*, 21 How. 582, 595, that when the court having jurisdiction of her suit allows the wife from her husband's means, by way of alimony, a suitable maintenance and support, "it becomes a judicial debt of record against the husband; and is as much a debt of record, until the decree has been recalled, as any other judgment for money is." And if the duty of the husband to provide proper maintenance and support for his wife, before and after a decree of divorce, is not technically a debt, it is, nevertheless, a paramount obligation springing out of a sacred relation, which, when it has passed into [483] judgment, should, as such, carry with it the well-known binding force that attaches to judgments at law.

We have examined the adjudications in the several states to which our attention has been called, and we think that reason and the weight of authority favor the conclusion that a decree of divorce awarding alimony to the wife in a gross sum creates a lien on the husband's real estate.

In the case of *Lawton's Petition*, 12 R. I. 210, it was held that an allowance of alimony in the sum of one hundred dollars per annum during the wife's natural life, or until the further order of the court, to be paid semi-annually, did not constitute a lien, payment not having been secured by an express charge on the real estate. But, in that state, judgments are not liens upon real estate except under levy of execution, and decrees for alimony are not an exception unless they become so by being specially charged upon lands.

In *Frakes* v. *Brown*, 2 Blackf. 295, the wife obtained a divorce, and a judgment for the sum of five hundred and fifty dollars as alimony. By virtue of a *fieri facias* issued upon this judgment, the land in question was sold, and Brown, the complainant, was the purchaser. In a bill in chancery the

complainant prayed that a conveyance of the land made by the husband to the defendant, Frakes, might be set aside as fraudulent and void. In the opinion Blackford, J., says: "It is said that real estate is not liable on a decree for a divorce and alimony. The answer to this is, that here is a judgment against the husband for a certain sum of money, rendered by a court having jurisdiction of the cause; and that every judgment of this kind is, by statute, a lien on real estate. It is not for this court to look beyond the judgment in the case before us. It must be considered as having the same effect as all other judgments for the payment of money, whilst it stands unreversed, and remains unsatisfied." The statute by which judgments became a lien on real estate was the general enactment: "Judgments in the circuit courts are hereby made liens on the real estate of the defendant or defendants, from the day of the rendition thereof, in the county where such judgment [sic] may be rendered": Ind. Rev. Laws of 1824, 192.

In *Keyes* v. *Scanlan*, 63 Wis. 345, the complaint set out that the plaintiff recovered a judgment for divorce against her husband, and that the sum of three hundred dollars alimony and costs of suit were adjudged in her favor. Section 2367 of the annotated statutes of Wisconsin provides, that upon the failure to pay the alimony adjudged to the wife, "the court may enforce the payment thereof by execution or otherwise, as in other cases." In construing this language, the court say: "There are very satisfactory reasons for saying that the divorce judgment stood upon the same footing as ordinary money judgments, and became a lien upon the real estate of the debtor liable to execution as soon as docketed." Further citations are unnecessary. These and similar cases illustrate the principle that a judgment for a gross sum should be none the less a lien on real estate, because rendered for alimony in a divorce proceeding.

In our opinion the circuit court did not err in holding that the plaintiff, Minerva Conrad, could not maintain her action to restrain the sheriff from the sale of the premises acquired by her after the judgment for alimony was rendered, and that such judgment became a lien on the premises, which Mrs. Everich could enforce by a levy of execution and a sale to satisfy it.

Judgment affirmed.

MARRIAGE AND DIVORCE—ALIMONY—WHETHER DEBT.—Alimony is not strictly a debt due to a wife, but rather a general duty to support made specific and measured by the court: *Romaine* v. *Chauncey*, 129 N. Y. 566; 26 Am. St. Rep. 544, and note. See the extended note to *Methuin* v. *Methuin*, 60 Am. Dec. 665.

MARRIAGE AND DIVORCE—ALIMONY WHETHER LIEN ON HUSBAND'S REALTY.—The husband's realty cannot be set off to the wife in fee simple for the purpose of giving her alimony: *Russell* v. *Russell*, 4 G. Greene, 26; 61 Am. Dec. 112, and note. A decree for the partition of a husband's estate is not proper unless he refuses to give bond to secure to the wife the portion of the annual profits of his estate decreed to her as alimony: *Lockridge* v. *Lockridge*, 3 Dana, 28; 28 Am. Dec. 52. In a suit for divorce the land which goes to the wife as the result of the divorce is not the subject matter of the litigation, and the court has no jurisdiction to affect or divest the title of the husband to his lands, or to decree that one-third of them shall be set apart to the wife, independent of a decree of divorce: *Houston* v. *Tinnerman*, 17 Or. 499; 11 Am. St. Rep. 848, and note; but see *Powell* v. *Campbell*, 20 Nev. 232; 19 Am. St. Rep. 350.

BREWING COMPANY *v.* BAUER.

[50 OHIO STATE, 560.]

EVIDENCE MUST BE CONFINED TO THE ISSUES, but this rule does not exclude testimony capable of affording a reasonable presumption or inference as to the principal fact or matter in dispute.

EVIDENCE OF OTHER ACCIDENTS.—In an action to recover for injuries sustained by an employee, and which he claims resulted from the unsafe and dangerous character of an appliance with which it was his duty to work, evidence tending to show that on a prior occasion the same appliance behaved in the same manner as when he was injured is competent as tending to prove some vice in its construction rendering its operation dangerous, and that the employer knew, or should have known, of such vice.

Waite and Snider, for the plaintiff in error.

James E. Pilliod and Ashton H. Coldham, for the defendant in error.

563 MINSHALL, J. The action below was by an employee of the defendant to recover damages for a personal injury caused, as claimed, by the negligence of the defendant in furnishing an unsafe appliance with which to do the work in which he was employed. The averments are, in substance, that while operating, by the direction of the superintendent of the company, a lift, used for the purpose of elevating barrels and similar packages from a lower to an upper floor, he was injured, without fault on his part, by one of these pack-

ages falling back upon him, and that it resulted from the negligent and defective construction of the appliance, of which the defendant had notice, but of which he had no knowledge, and could not have had, in the exercise of ordinary care on his part. Issues were joined upon the averments of the petition as to the defective character of the lift, the negligence of the defendant, and the averments that it happened without fault on the part of the plaintiff. It appeared that the lift or elevator consisted of a broad, heavy, rubber belt, with certain lateral supports and guides of timber, running nearly perpendicular against a board the full width of the belt, and over a pulley just above the upper floor, and around another just below the washroom floor. To the face of this band were attached two sets of iron hooks or arms, which, as the band revolved, [683] caught the barrels on the under side and carried them up through an opening in the floor; and as they turned on the upper pulley the barrels fell away by their own weight to the floor above and left the hooks free to continue their downward movement. The barrels to be elevated were placed upon a skid raised above the lower floor and inclined towards this revolving band, and the man tending the elevator rolled them, one at a time, against the band, ready for the hooks coming around and upward from the lower pulley to carry them over the pulley above; and as one barrel was freeing itself from the hooks above, the other set of hooks were about ready to receive the next barrel. While the plaintiff was engaged in so placing the barrels ready to be taken up by the hooks, one of them, a half-barrel, after being carried part way up, fell from the hooks, and striking his hand, then resting on the barrel next to go up, caused the injury complained of.

It was claimed that these hooks or arms were too short, and that in any irregular motion of the belt, the barrel or package being lifted would drop out and fall back; and that this was not an infrequent occurrence, when, as sometimes happened, the belt became too loose.

During the progress of the trial a witness was called by the plaintiff, and stated, in answer to a question, that some time before he had been employed by the defendant to do the same work, and that while so employed a barrel fell back and injured him. The counsel for the plaintiff stated that this was offered for the sole purpose of showing the dangerous character of the machine, and the defendant's knowledge of

that fact, and for no other purpose. The court then stated that it would be received for these purposes, and no other; and so instructed the jury at the time. Similar evidence as to the falling back of barrels while the lift was being operated was given by other witnesses, to which the defendant excepted at the time.

The jury rendered a verdict in favor of the plaintiff, on which the court, after overruling a motion for a new trial, rendered judgment. The judgment having been affirmed by 564 the circuit court, this proceeding is prosecuted to obtain a reversal of both judgments so rendered.

The only question in the case is, as to the admissibility of the evidence offered to show that on former occasions, when the elevator was being operated, barrels and packages fell back and injured the person operating it, as in this case.

It is claimed to be incompetent on the ground that it raises collateral issues, tending to mislead the jury and to surprise the opposite party, by the introduction of evidence for which he could not have been prepared by the nature of the issue. The rule relied on is thus stated by Greenleaf: "The evidence offered must correspond with the allegations, and be confined to the point in issue": Greenleaf on Evidence, sec. 51. And he adds, in the following section: "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal matter or fact in dispute."

The authorities on the question are conflicting. The courts of Massachusetts and some of the other states hold that such evidence is not within the issue, but collateral to it, and should be rejected: *Collins* v. *Dorchester*, 6 Cush. 396; *Aldrich* v. *Pelham*, 1 Gray, 510; *Phillips* v. *Town of Willow*, 70 Wis. 6; 5 Am. St. Rep. 114. But reason and the weight of authority are the other way. The rule, as stated by Greenleaf, excludes only those facts "which are incapable of affording any reasonable presumption or inference as to the principal matter or fact in dispute." So that a fact cannot be said to be collateral to the issue if, when established, it tends to prove or disprove the principal fact in dispute. In this case a number of principal facts were in dispute; among these were the defectiveness of the machine, and the defendant's knowledge of that fact, as well as his negligence in the premises. If the evidence objected to tended to prove either of these facts, there was no error in its admission. There is no rule of evi-

dence which requires that what is offered should be relevant to every issue in the case; it may be relevant to one, and irrelevant to another. No party can, as a rule, prove his case *uno flatu*. He is compelled, in the nature of things, to proceed step by step. And [565] it not infrequently happens that what is competent for one purpose is not for another. The mixed character of the evidence does not, however, render it wholly incompetent. The evidence in such case is admitted with a direction from the court to the jury as to how it is to be applied—on what issues it is to be considered, and on what not; as was done in this case.

On reason it seems plain that evidence as to how this lift or elevator behaved on former occasions—that, at other times when being operated by other persons, barrels being lifted, had fallen and injured those operating it, or had simply fallen back, the conditions remaining substantially the same, tended to prove some vice in its construction that rendered its operation dangerous, and that the company knew or should have known the fact. Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety as well as of its usefulness; and the fact that the carefulness of the party operating the machine may be involved in each instance may affect the weight of the evidence, but not its admissibility, as such a limitation would exclude the result of every experiment offered in evidence; which would amount to a *reductio absurdum*. The defectiveness of the lift and the company's knowledge of it would not, however, alone constitute actionable negligence. The character of the machine and the employer's knowledge being established, it still remains a question of fact, whether, under all the circumstances, a case of actionable negligence has been made out. That which caused the danger may have been irremediable, and it is no violation of duty by an employer to put one in his employ at the operation of a dangerous machine, if the employee is fully informed as to its character, and voluntarily accepts the employment. Wherever force is applied to machinery there is more or less danger to those operating it; so that the duty of the employer toward his employee is not to furnish a perfectly safe machine, but one as safe as can be provided in the exercise of ordinary care [566] and prudence. Whether the

employer is negligent in this regard does not depend solely upon the fact that the machine is known by him to be a dangerous appliance, but whether with such knowledge he neglected to do what a person of ordinary care could and would have done under such circumstances. It was, however, incumbent on the plaintiff, in making out his case, to show the dangerous character of the machine and the company's knowledge, as well as its negligence; and, while the evidence was not competent to prove negligence, it did tend, as we have shown, to prove the other facts, and was, therefore, admissible. As said by the judge delivering the opinion in *Darling* v. *Westmoreland*, 52 N. H. 403, 13 Am. Rep. 55: "The evidence to prove several independent propositions or distinct facts may be of different kinds and drawn from different sources." If evidence offered be relevant to any issue in the case it is admissible, however incompetent it may be, upon other issues. Commenting on the rule that confines the evidence to facts put in issue by the pleadings, and excludes collateral issues, Doe, J., in the case just cited, says: "This rule merely requires the evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge." And it was there held that, on the question whether a pile of lumber was likely to frighten horses, evidence is admissible to show that horses passing it were or were not frightened by it.

In *McCarragher* v. *Rogers*, 120 N. Y. 526, an action to recover damages for an injury sustained by the plaintiff while working at a machine in the employ of the defendant, a person who had previously been injured while working the machine in the capacity of the plaintiff was asked, "How did the injury occur to you," and he answered, "It jumped out of the socket in the same way," the evidence was held to be relevant and competent as bearing upon the question of the condition of the machinery. And the court said, that, while the decisions are not in entire harmony on the question, such is the rule recognized in that state. And so in *Morse* v. *Minneapolis etc. Ry. Co.*, 30 Minn. 465, 471, which was an [667] action by an employee of defendant to recover for an injury caused by its negligence in permitting its tracks to be and remain out of order, such evidence was held competent. The court said: "It is, of course, not competent for the purpose of showing independent acts of negligence, but

we think on principle it is clearly admissible when it tends to show that the common cause of these accidents is a dangerous or unsafe thing. It would be certainly competent to prove by an expert that, at a time either before or after the accident when the instrument claimed to have caused it was in the same condition as when the accident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence, there seems no reason for excluding ordinary experience when confined within the same limits and for the same purpose. These facts are in the nature of experiments to show the actual condition of the instrument. Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue; its only importance is that it bears on the main issue, and, if it does, it is competent." We have quoted thus fully from the opinion in this case, because it seems to set forth clearly and fully the reasons for the admission of such evidence, and to answer every objection that can be made.

The reasoning on the Massachusetts cases, cited above, and relied on by the plaintiff in error, has generally been regarded as unsound; and, for this reason, the decisions have not generally been followed as precedents by the courts of the other states. *Osborne* v. *City of Detroit*, 32 Fed. Rep. 86, where it is said, referring to the Massachusetts cases, the weight of authority is decidedly the other way; *City of Chicago* v. *Powers*, 42 Ill. 169, 173; 82 Am. Dec. 418; *Moore* v. *City of Burlington*, 49 Iowa, 136; *Walker* v. *Westfield*, 39 Vt. 246, 251; it is here said that "a fact, that illustrates, as by an experiment the condition of the subject matter of the issue in controversy, is not collateral to the issue, but is direct evidence bearing upon it." *City of Aurora* v. *Brown*, 12 Ill. App. 122; *Darling* v. *Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55—here the Massachusetts cases are considered and declared unsound. *Delphi* v. *Lowery*, 74 Ind. 520; 39 Am. Rep. 98, contains an elaborate review of the cases.

Cook v. *New Durham*, 64 N. H. 419; *Kent* v. *Town of Lincoln*, 32 Vt. 591; *Piggot* v. *Eastern Counties Ry. Co.*, 3 Com. B. 229.

As the evidence objected to tended to prove that the lift had in it a vice, making it dangerous to operate, and that the company had notice of this from its previous behavior, there was no error in admitting the evidence, with a direction to the jury that it was to be confined to these purposes, and could not be considered on the question of the defendant's negligence in the premises.

Judgment affirmed.

SPEAR and BURKETT, JJ., dissent from the judgment of affirmance.

EVIDENCE OF OTHER ACCIDENTS.—The following line of cases hold that such evidence is inadmissible: *Bremner* v. *Inhabitants*, 83 Me. 415; 23 Am. St. Rep. 782, and note; *Matheus* v. *Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and note; *Phillips* v. *Town of Willow*, 70 Wis. 6; 5 Am. St. Rep. 114, and note; and *Cleveland etc. Ry. Co.* v. *Wynant*, 114 Ind. 525; 5 Am. St. Rep. 644. See, also, the extended note to *Hudson* v. *Chicago etc. R. R. Co.*, 44 Am. Rep. 694–696, and the notes to *Branch* v. *Libbey*, 57 Am. Rep. 812, and *Collins* v. *Council Bluffs*, 7 Am. Rep. 208.

EVIDENCE NOT WITHIN THE PLEADINGS should be stricken out: *Atlanta etc. R. R. Co.* v. *Kimberly*, 87 Ga. 161; 27 Am. St. Rep. 221.

DE CAMP *v.* ARCHIBALD.

[50 OHIO STATE, 618.]

A NOTARY PUBLIC IS AUTHORIZED TO PUNISH A WITNESS FOR CONTEMPT if the statute relating to depositions authorizes them to be taken before notaries public, and declares that the refusal to answer as a witness, when lawfully ordered, may be punished as a contempt by the court or officer by whom the attendance or testimony of the witness is required.

CONSTITUTIONAL LAW—RULES OF INTERPRETATION.—Words used in a constitution are to be interpreted with reference to the usage or custom of the country at the time of its adoption.

CONSTITUTIONAL LAW.—WHAT CONSTITUTES JUDICIAL POWER within the meaning of the constitution is to be determined in the light of the common law and the history of our institutions as they existed anterior to, and at the adoption of, the constitution.

CONSTITUTIONAL LAW.—A NOTARY PUBLIC MAY BE AUTHORIZED TO PUNISH A WITNESS FOR CONTEMPT in refusing to answer a material question on the taking of a deposition. The statute purporting to confer such authority is not in conflict with a constitution vesting all the judicial power of the state in certain courts.

A WITNESS IS GUILTY OF CONTEMPT in refusing to answer a question, if it does not involve any question of privilege on his part, and the notary determines it to be competent.

LIBEL.—A DEFENDANT MAY SHOW PROVOCATION FOR AN ALLEGED LIBEL, consisting of prior publications against himself of a provoking character, and to which the plaintiff contributed.

Harmon, Colston, Goldsmith and Hoadly, and Follett and Kelley, for the plaintiff in error.

Bateman and Harper, for the defendant in error.

[691] MINSHALL, J. The object of this proceeding is to reverse an order of the court of common pleas of Hamilton county, affirmed by the circuit court, remanding the plaintiff in error to the custody of the sheriff of the county, in a proceeding in *habeas corpus*, the return of the sheriff showing that the party had been committed to the jail of the county by a notary public for refusing to answer certain questions propounded to him, his deposition being taken at the time before the notary to be used as evidence in an action then pending in the superior court of Cincinnati, the suit being that of *Charles A. Costello* v. *The Post Publishing Co.*, for an alleged libel published in the paper of the defendant, called *The Cincinnati Post*. The plaintiff in error, Joseph M. De Camp, having been called as a witness by the defendant, was asked, among other questions, the following: "You have stated that you prepared the substance of the article published in the *Miami Valley News*, and employed somebody else, or got somebody else, to assist you in putting it into shape. I will ask you who that person was?" After an exception to the question by the plaintiff as incompetent and irrelevant, the witness answered: "Well, it was not Mr. Costello." To which the counsel for the defendant said: "That does not answer the question. I did not ask you who [692] it was not, but who it was." To this the witness answered: "Well, I have stated several times that Mr. Costello had nothing to do with that article." He was then asked if he refused to answer the question, and he answered that he did. Thereupon counsel for defendant said: "I shall ask the notary to order you to answer the question, and I state that the article from which the matter complained of in the petition in this case was taken referred to the article mentioned in the question in *The Miami Valley News* as the occasion for writing it, and charged Mr. Costello with having procured the article to be published. And we expect to show that the person who prepared the article, or assisted Mr. Costello in preparing it, was Otto Reich; that Otto Reich did prepare it, caused it to

be typewritten, and put in shape for publication, with the knowledge and in consultation with Mr. Costello; that the article itself was scurrilous, indecent, and scandalous, and was the provocation for writing and publishing the article which is complained of in the plaintiff's petition. And therefore we desire the evidence for the purpose of proving, or aiding in the proof of, the above facts."

He was then ordered by the notary to answer the question, but refused to do so.

Counsel for the defendant then stated that before asking the commitment of the witness for his refusal to answer the above question there were some other questions he wished to ask him. He then said: "You have stated that three hundred copies or thereabouts of the article were sent to your house on Saturday, and on Saturday night distributed, partly by the aid of persons you had requested to assist you in doing it. I ask you to state who these persons were." The witness stated that Mr. Costello was not one of them; but refused to answer who they were. Counsel for the defendant then stated: "We shall offer testimony at the trial to show that the publication and distribution was made with the knowledge of, and in consultation with, the plaintiff in this action, and that the circumstances of such distribution to the families of Wyoming, including the family of the author of this article, constituted the provocation for the writing of the 633 article complained of, which refers to the article in *The Miami Valley News*, and the manner of its distribution, as being in part an act of Mr. Costello. I shall therefore ask that the witness be compelled to answer the question, and I shall object to any statement of the witness as testimony being made until this question is answered." The notary then ordered the witness to answer the question, and he still refused. At the conclusion of the examination the notary adjudged the witness guilty of contempt in refusing to answer the above questions, and committed him to the jail of the county, there to remain until he should testify as ordered.

It is claimed that the court erred in remanding the party on these grounds: 1. That no power is conferred on a notary by the statutes of Ohio, in taking a deposition, to commit a witness to jail for refusing to answer a question; or, if this be not so, then 2. Such power, being judicial in character, cannot be conferred on a notary; and 3. The questions pro-

pounded the witness were incompetent and irrelevant, and furnished no ground for a commitment.

1. As to the first question, Is such power conferred on a notary public by the statutes of the state? It is claimed that the only power possessed by a notary in such matters is that conferred by section 119 of the Revised Statutes, giving to him the same power, in taking depositions, to punish a witness for refusing to testify that is conferred on a justice of the peace; which power is conferred by sections 6541 and 6542 of the Revised Statutes. These sections empower a justice of the peace to impose a fine of five dollars upon a witness who refuses to testify before him in any matter in which he has power to require such witness to appear and testify. The power to imprison or to impose a greater fine than five dollars is not conferred by these sections. If this were the limit of the power conferred by statute upon an officer in taking depositions to deal with a contumacious witness the argument would be conclusive. But we do not think so. The mode of taking testimony by depositions is provided for in the part of our Revised Statutes relating to civil procedure. Section 5269 designates the officers before [624] whom evidence in this form may be taken, and includes "a notary public." Section 5252 provides, among other things, that "a refusal to answer as a witness, when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required"; and section 5254 provides that "the punishment for the contempt mentioned in section 5252 shall be as follows: When the witness fails to attend in obedience to the subpœna the court or officer may fine him in a sum not exceeding fifty dollars; in other cases the court or officer may fine the witness in a sum not exceeding fifty nor less than five dollars, or may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." It is plain that by these sections a notary, as any other officer empowered to take depositions, may imprison a witness in the jail of the county for a refusal to testify before him, when required to do so, and the imprisonment may be until he consents to do so; and this is not inconsistent with the power conferred on him by section 119 of the Revised Statutes. This section does not purport to limit the powers of a notary public to those of a justice of the peace in matters of contempt, and is entirely consistent with a statute

that confers on him other and greater powers in such matters, as is done by the section above referred to.

The fact that this construction seems to render the provision as to notaries, contained in section 119, unnecessary, is of no consequence, when we consider how the statutes of the state have been built up by the annual labors of the legislature, through a long series of years; and, so long as consistency is preserved by the legislature in making amendments to the laws redundancy is a matter of no great moment.

2. It is next maintained that the imprisonment of a witness for refusing to answer a question cannot be conferred on a notary, to be exercised in taking a deposition, because such power is judicial in character, and is conferred by the constitution upon the courts of the state: Const., art. 4, sec. 1.

698 It is a rule of general application that words used in a constitution are to be interpreted with reference to the usages and customs of the country at the time of its adoption. It will be presumed to have been adopted by the people with the understanding of its terms derived from such sources. Thus it is said by White, J., in *State* v. *Harmon*, 31 Ohio St. 250, that "what constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution." And so, in *Merrill* v. *Sherburne*, 1 N. H. 199, 8 Am. Dec. 52, Woodbury, J., speaking of the constitution of his own state, says: "No particular definition of judicial power is given in the constitution; and, considering the general nature of the instrument, none was to be expected. Critical statements of the meanings, in which all important words were employed, would have swollen into volumes; and when those words possessed a customary signification a definition of them would have been useless."

The term "judicial power," as used in the constitution, is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties.

Power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers. But this has not been held to affect the validity of statutes by which such powers are conferred: *State* v. *Hawkins*, 44 Ohio St. 98–109. The term "judicial power" has never been taken with such latitude of construction in the usages and customs of our American commonwealths; and to so extend the jurisdiction of the courts would lead to the most embarrassing results, with little or no compensation whatever. The taking of depositions is [626] not only a very ancient, but, in many instances, necessary method of obtaining evidence to be used in the trial of a cause. Without such means of obtaining evidence justice could not, in many cases, be done, as the attendance of the witness at the trial could not be secured; and, if the witness cannot be compelled by the officer taking the deposition to answer a proper question, the rights of a party might be sacrificed to the perversity of the witness. In states where, as in our own, the power is conferred by statute, it has frequently been exercised by notaries and sustained by the courts: *Dogge* v. *State*, 21 Neb. 273, 278; *In re Abeles*, 12 Kan. 451; *Ex parte McKee*, 18 Mo. 599; Proffatt on Notaries, sec. 89; Giauque on Notaries, sec. 146.

The case of *Kilbourn* v. *Thompson*, 103 U. S. 168, is relied on by the plaintiff in error, but is not, as we think, in point. The case does not deny to either house of Congress the power to punish a witness for contempt, where the matter that is the subject of inquiry is within its jurisdiction. It is only when it has no jurisdiction that the power is denied; and, the matter then being inquired into, the indebtedness of Jay Cook & Co., being, as held by the court, within the jurisdiction of the courts of the United States, and not in that of Congress, the commitment of Kilbourn for refusing to answer a question put to him by a committee of the House of Representatives, touching that indebtedness, was held illegal.

This seems the first time the question has been presented to this court, though the statute conferring the power is of long standing. Any abuse is carefully guarded against, by the power given any judge by section 5255 of the Revised Statutes, on application of the witness to discharge him if he find the imprisonment to be illegal.

Finally, it is claimed that the questions put to the plaintiff in error as a witness were incompetent, and, therefore, the

commitment was illegal. It might be a sufficient answer to this to say that neither of the questions involved any question of privilege on the part of the witness, and no such privilege was claimed as an excuse for not answering; and it seems well settled that, whether the questions [627] are in other respects competent, is a matter for the determination of the court on the trial of the action in which the depositions are being taken: *Ex parte McKee*, 18 Mo. 599; *People* v. *Sheriff*, 7 Abb. Pr. 96; *People* v. *Cassels*, 5 Hill, 164; *Bradley* v. *Veazie*, 47 Me. 85; Rapalje on Contempts, secs. 66, 69, 70; Proffatt on Notaries, 202.

Here, however, the evidence sought by the questions seems to have been entirely competent. The action being for a libel, the defendant had the right, in mitigation of damages, to show provocation. He had the right to show a prior publication by the plaintiff of a provoking character, or that the plaintiff had been instrumental in the distribution of such a publication. This seems to be unquestioned law: Townshend on Slander and Libel, sec. 414. "For the law makes allowances for the infirmities of human nature and for what is done in the heat of passion, produced by the improper conduct of the adverse party": Newell on Defamation, 519. The object of the questions that the witness refused to answer was, as appears from the statement of counsel, to show that the plaintiff in the action had assisted in the publication and distribution of a scurrilous, indecent, and scandalous article in *The Miami Valley News*, and which provoked the publication complained of. It is true that the witness stated that Mr. Costello had nothing to do with it. This may have been true to the best of his knowledge, but may not have been true in fact. An answer to the questions would not therefore necessarily have tended to impeach him. The person who assisted the witness may have been instigated by Mr. Costello. The defendant had, therefore, the right to know who assisted the witness in the publication and distribution of the article in *The Miami Valley News*, as such information might have enabled him to connect the plaintiff with the publication and distribution of the article in that paper. Hence, both questions were competent and should have been answered.

Judgment affirmed.

NOTARIES PUBLIC—POWER TO PUNISH WITNESS FOR CONTEMPT.—Where a witness duly summoned by a notary public to testify in a cause by giving his deposition refuses to testify he may be committed by the notary for

contempt for such refusal: *In re Abeles*, 12 Kan. 451; *Dogge* v. *State*, 21 Neb. 272. The superior court in which an action is pending has no power under sections 1986 and 1991 of the Code of Civil Procedure to punish a person for contempt who has refused to obey a subpœna issued by a notary public before whom his deposition was to have been taken: *Lezinsky* v. *Superior Court*, 72 Cal. 510.

CONSTITUTION—INTERPRETATION.—In construing a provision of the constitution, its history and the conditions and circumstances attending its adoption must be kept in view: *Sweet* v. *Syracuse*, 129 N. Y. 316; *Higgins* v. *Prater*, 91 Ky. 6. In the construction of written constitutions courts are to be governed by the purpose of the framers: *Brodhead* v. *Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711. In construing a constitutional provision the meaning of which cannot be gathered for its language, the court will consider the contemporaneous practical construction placed on it by the legislature and the public and uniformly acquiesced in: *Chrisman* v. *Brookhaven*, 70 Miss. 477, *Harrison* v. *State*, 22 Md. 468; 85 Am. Dec. 658, and note; *Bruce* v. *Schuyler*; 4 Gilm. 221; 46 Am. Dec. 447. See the extended note to *Schuessler* v. *Dudley*, 60 Am. Rep. 128–130.

LIBEL—JUSTIFICATION—PROVOCATION BY PLAINTIFF.—Previous publications by the plaintiff are not admissible in an action for libel, unless the defendant's publication was in the nature of an answer to or a commentary upon the plaintiff's writing, and therefore partook of the nature of a privileged publication: *Maynard* v. *Beardsley*, 7 Wend. 560; 22 Am. Dec. 595.

SMITH *v.* COMMISSIONERS.

[50 OHIO STATE, 628.]

HIGHWAYS.—THE ESTABLISHMENT OF A GRADE does not necessarily require the enactment of an ordinance or other legislative action, but may be shown by the nature of the improvement on the surface of the highway under the direct sanction of the proper authorities, whether in accordance with an ordained grade line or not.

HIGHWAYS, CHANGE IN GRADE OF.—If a public highway is so laid out as to indicate that it is designed for permanent use by the public without substantial alteration, and an abutting owner improves his property with reference thereto, and to its reasonable improvement in the future for the public convenience, any subsequent change in the grade substantially impairing his passage to and from the highway is an injury to his property for which he is entitled to compensation.

ACTION against the board of county commissioners of Wayne county to recover damages alleged to have been sustained by a change of the grade of a highway. The plaintiffs alleged themselves to be the owners of certain real property, and that for more than fifty years last past a public highway had run through such land, and been kept in repair and condition for public use by the public authorities vested with the control and management of roads in the county; and that the grade of

the road had been established, kept, and maintained for at least fifty years at practically the same level; that the plaintiffs' land was improved farming land with dwelling-house, barn, and suitable farm buildings thereon, adjacent to and along the road, and with reasonable reference to its presumptive improvement and further enjoyment by the public authorities, and by reason of the established grade of such road plaintiffs' lands and buildings were of ready and easy access to and from the same; that in 1884 defendants changed the grade and surface level of the road by excavating a part thereof to the depth of sixteen feet, and along and in front of the buildings already mentioned to a depth of from five to nine feet, and that along the other portions of the plaintiffs' land the grade was changed so as to cause the road to be filled to a height of fifteen feet at different points; that by reason of these changes the buildings and improvements of plaintiffs had been shut off from access to the highway and the value of plaintiffs' land greatly impaired; that the change of grade was made without any notice to plaintiffs, and without paying them any compensation, or causing any assessment of damages to be made, and therefore plaintiffs asked for a jury to assess their damages, and alleged that such damages amounted to fifteen hundred dollars. A demurrer to the complaint was sustained, and the plaintiffs declining to amend, judgment was entered against them, and they appealed.

McClure and Smyser, for the plaintiffs in error.

John McSweeney, for the defendants in error.

633 DICKMAN, J. The first question that claims our consideration is, whether the original petition states facts sufficient to constitute a cause of action for damages, in consequence of excavating and filling the highway to which the lands and buildings of the plaintiffs were adjacent. The general rule is well established in this state that a municipality may become liable for consequential damages caused in grading a street. The owner of a lot abutting on a street has an easement in the street appendant to his lots whereby he is entitled to an unobstructed access to and from the street, and this appendant easement is as much property as the lot itself. This right of property vested in the owner of abutting land is subject, however, to the right of the public to grade and improve the street. But grades once established are presump-

tively permanent, and cannot, it is obvious, be changed without causing injury and confusion: Elliott on Roads and Streets, 346. And, as is said in *Crawford* v. *Delaware*, 7 Ohio St. 471, "if, after establishing the grade, they block up or cut down the street before one man's house for the benefit of others, doing a substantial injury, the rights of property have been invaded, and the plainest principles of justice require compensation."

The private rights, easement, and facilities of the owner of lands in the adjacent highways are not, upon principle, materially different from those of the owner of lots in towns and cities in the adjacent streets. But, in both instances, it is recognized as a fundamental principle, that if improvements are made on lots or lands in accordance with an established grade, and the grade is afterwards altered, and a substantial injury thereby done to the owner of such lots or lands, he will be entitled to compensation.

A grade line for a public road or highway may become practically established though not evidenced by legislative enactment definitely fixing the line. In *Akron* v. *Chamberlain Co.*, 34 Ohio St. 336, 32 Am. Rep. 367, it is said: "We are of opinion that the establishment of a grade whereby lot-owners are justified in assuming that no change will be made in the grade of a street, and may, therefore, improve their lots with reference to its present condition, so that the municipality [684] will be liable for injuries to their improvements, resulting from a subsequent change of the grade, does not necessarily require the passage of an ordinance or other legislative action; but it may be shown, by the nature of the improvement on the surface of the street, under the direction or sanction of the proper authorities, whether in accordance with an ordained grade line or not."

And when a public highway has been so laid out as to indicate that it is designed for permanent use by the public without substantial alteration, and the owner of adjacent lands and buildings improves the same with due reference to the highway as thus established, and to its reasonable improvement in the future for the public convenience, if such owner's passage to and from the highway be thereafter impaired by a substantial alteration in the highway, it will be an injury to his property for which he will be entitled to indemnity. This is but a restatement of the rule announced in the opinion in *Jackson* v. *Jackson*, 16 Ohio St. 168, that such owner has a

private right of access to and from the highway; and, when he has made improvements on his land, with direct reference to the adjoining highway as then established, and with reasonable reference to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway.

The record in the case at bar discloses as facts admitted on demurrer to the original petition, that the grade of the public road leading from Doylestown to Akron had been established, kept and maintained in reference to adjacent lands; and the grade and surface of the road, and the plaintiffs' lands, for at least fifty years preceding, and until the change of the grade and surface level of the road in 1884, had been kept and maintained at practically the same level. The plaintiffs' lands adjacent to and along the road had, during the time above mentioned, been improved with suitable buildings and thereon; and had been so improved, and the buildings erected and maintained with reference to the established grade of the road, and with reasonable reference to its prospective improvement and future enjoyment by the public. By reason of the established grade and relative level of the road, there was ready and easy access between the road and the lands and buildings of the plaintiffs. But, by changing the grade and surface level, in the manner and to the extent set forth in the petition, the means of access to lands, buildings, and improvements from the road, and to the road from such lands, have been impaired and made inconvenient and difficult.

Upon an application to the facts stated in the petition, of the legal principles recognized and enforced in the decisions of this court, we are of the opinion that the plaintiffs in error had a right of action against the defendants in error for damages in consequence of the alleged change and alteration in the grade of the road or highway.

But it is urged in behalf of the defendants that the petition in the case sets forth a tort, and that, therefore, the action is not maintainable against the board of county commissioners in their *quasi* corporate capacity. County commissioners

have power to improve any state, county, or township road, or any part thereof, by grading, paving, graveling, planking or macadamizing the same: Rev. Stats., sec. 4829. Having exercised the power granted by statute of changing the grade of the road or highway, for the purpose of improving the same, there is no claim that the work was done in a careless manner, and no question consequently arises of negligence in the discharge by the defendants of their official functions. In their official capacity, as the representatives of the county, having improved the road for the public benefit by changing its grade, the sole question involved, namely, that of compensation by the county, to the owner of adjacent lands, gives rise to no inquiry as to any personal wrong, neglect, or default on the part of the commissioners.

The judgments of the circuit and common pleas courts should be reversed, and the cause remanded for further proceedings.

Judgment accordingly.

MUNICIPAL CORPORATIONS.—LIABILITY FOR ALTERING GRADE OF STREET: See *Columbus Gas Light etc. Co.* v. *Columbus*, 50 Ohio St. 65; *ante*, p. 648, and note, and also the extended note to *Goddard* v. *Inhabitants*, 30 Am. St. Rep. 389.

DOERR *v.* FORSYTHE.

[50 OHIO STATE, 728.]

A JUDGMENT OF DIVORCE GRANTED IN ANOTHER STATE against a wife over whom the courts did not have jurisdiction, while it may dissolve the marriage relation existing between the parties, cannot affect her rights in the property of her husband situate in this state.

SUIT by Laura Ann Wood to recover dower in certain lands to which she claimed to be entitled as the widow of Isaac M. Wood. The defendant insisted that she was not the widow of Wood at the time of his death, and in support of such claim relied upon a decree of divorce entered in the state of Indiana. The trial court found that Isaac M. Wood in the year 1858 removed to the state of Indiana, but that his wife Laura remained a resident of the state of Ohio; that a decree of divorce was entered in favor of Isaac M. Wood, and against his wife in the state of Indiana, in the year 1859; that the wife knew nothing of the proceedings for divorce against her until after the death of her husband, but that by the laws of

Indiana a decree of divorce released both husband and wife absolutely from the marriage contract and dissolved the marriage relation. After the divorce Isaac M. Wood contracted a second marriage, and thereupon executed a conveyance, in which his second wife joined, conveying the property in controversy to John Myers, under whom the defendants claim title. As conclusions of law, the trial court found that the divorce in Indiana was inoperative as against Laura Ann Wood, and she, having died during the pendency of the action, that her administratrix was entitled to recover the value of the dower of said Laura Ann Wood from the filing of the petition in this action to the date of her death. From a judgment against him on these findings the defendant appealed.

Kramer and Kramer, and Lowery Jackson, for the plaintiff in error.

William Disney, for the defendant in error.

730 THE COURT. The court below did not err in its conclusions of law from the facts as found. The decree of divorce granted the husband in the state of Indiana acted only on the marital relation between the parties, and did not affect, nor purport to affect, the property rights of the wife in the state of Ohio. For aught that appears the divorce may have been granted on some ground not recognized as a ground of divorce by the laws of this state; so that it cannot be said that it was granted for any aggression of hers, within the meaning of section 5700 of the Revised Statutes.

But if it were otherwise, as she had no opportunity to defend, all that can be claimed for that decree is that it dissolved the marriage relation between the parties, and restored the husband to the status of an unmarried man. This the court could do; but as it had no jurisdiction of the person of the wife it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the laws of this state: *Mansfield* v. *McIntyre*, 10 Ohio, 27; *McGill* v. *Deming*, 44 Ohio St. 645.

Judgment affirmed.

MARRIAGE AND DIVORCE—DIVORCE AGAINST NON-RESIDENT DEFENDANT—EFFECT OF.—Although a suit for a divorce is in the nature of a proceeding *in rem* or *quasi in rem*, in so far as it affects the marital *status* of the parties, as to alimony and costs it is a proceeding *in personam*: *Rigney* v.

Rigney, 127 N. Y. 408; 24 Am. St. Rep. 462, and note; to the same effect see *Harding* v. *Alden*, 9 Greenl. 140; 23 Am. Dec. 549, and note. See, also, the note to *Jones* v. *Jones*, 2 Am. St. Rep. 453, and the extended note to *Boykin* v. *Rain*, 65 Am. Dec. 359. A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights, which might have been settled by such decree, and a decree on service by publication is as effectual as where personal service is made: *Ree* v. *Ree*, 52 Kan. 724; 39 Am. St. Rep. 367, and note.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

PHILLIPS *v.* HENRY.

[160 PENNSYLVANIA STATE, 24.]

DURESS.—ASSIGNMENT OF PERSONAL PROPERTY by a debtor to a creditor cannot be set aside on the ground of duress because the assignment is the result of a threat by the creditor to a third person to arrest the debtor, when he is neither arrested, nor is any criminal prosecution instituted against him.

DURESS—ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignee for the benefit of creditors cannot plead that the assignment was made under duress by his assignor for the purpose of setting aside an otherwise legitimate transfer of property by the assignor to pay an honest debt.

ASSUMPSIT. M. A. Phillips, trading as Phillips & Co., having a claim against the Swedeland Manufacturing Company, assigned it to the use of the Haverhill Safe Deposit Company. Phillips & Co. afterwards made a general assignment for the benefit of creditors to L. B. Henry. The Swedeland Manufacturing Company, admitting the indebtedness, petitioned the court for leave to pay the amount into court, which was done, and an issue framed to determine which of the rival claimants was entitled thereto. The assignment to the Haverhill Safe Deposit Company was for a just debt, but it was sought to defeat the assignment on the ground that Phillips had been coerced into making it by threats of arrest for a crime committed in another state. His attorneys hearing of these threats communicated them to him, and advised him to make the assignment. Judgment in favor of the assignor. The assignee appealed.

H. C. Boyer and J. A. Clark, for the appellant.

J. B. Holland and J. M. Dettra, for the appellee.

[28] Per CURIAM. The testimony in this case is far short of the kind of testimony which is necessary to make out the defense of "duress." There was no imprisonment or restraint of the body, no process of arrest against the party, no prosecution for any criminal offense instituted, no officer of the law ready to arrest, no threat of any kind made by this particular plaintiff, and no threats by anybody made directly to the person affected. There was only a threat to resort to criminal proceedings, made in another state to certain friends of the party, by counsel for certain creditors, and communicated by them to their principal. Moreover, Phillips, [29] the party affected, is not setting up the defense or authorizing it to be done. The defense is made by one who is merely an assignee for the benefit of creditors, and we are of opinion that such a person cannot plead this defense for the purpose of setting aside an otherwise legitimate transfer of property made by his assignor to pay an honest debt. The opinion of the learned court below on the motion for a new trial contains the expression of sufficient reasons for the binding instruction to the jury to render a verdict for the plaintiff, and upon that opinion and the suggestions above made we affirm the judgment.

Judgment affirmed.

DURESS BY THREATS.—A mere threat of indictment does not constitute duress: *Claflin* v. *McDonough*, 33 Mo. 412; 84 Am. Dec. 54, and note. A person will not be relieved from liability on a contract on the ground that it was obtained from him by threats, unless they caused actual fear of some wrong, as of great bodily harm or unlawful imprisonment, or were of such a nature as to destroy the freedom of will of the party: *McClair* v. *Wilson*, 18 Col. 82; *Wolf* v. *Troxell*, 94 Mich. 573. Contracts made under fear of unlawful imprisonment can be avoided for duress: *Sanford* v. *Sornborger*, 26 Neb. 295. A threat of unlawful imprisonment is duress: *Eddy* v. *Herrin*, 17 Me. 338; 35 Am. Dec. 261, and note. To threaten one with criminal prosecution or a civil action is not duress, when he is believed in good faith to be liable to such suit or prosecution: *Thorn* v. *Pinkham*, 84 Me. 101; 30 Am. St. Rep. 335, and note. But see *Kruschke* v. *Stefan*, 83 Wis. 373. Duress of the person may be by actual arrest or imprisonment without lawful authority, or threats of unlawful arrest or imprisonment: *Belote* v. *Henderson*, 5 Cold. 471; 98 Am. Dec. 432, and note. See, also, the extended notes to *Mayor* v. *Lefferman*, 45 Am. Dec. 158, and *Hatter* v. *Greenlee*, 26 Am. Dec. 374.

COMMONWEALTH v. COYLE.

[160 PENNSYLVANIA STATE, 36.]

OFFICE AND OFFICERS—CRIMINAL LIABILITY FOR NEGLECT.—DIRECTORS OR OVERSEERS OF THE POOR are criminally liable at common law for wilful neglect or refusal to discharge their official duties to paupers under their charge.

OFFICE AND OFFICERS—CRIMINAL LIABILITY FOR NEGLECT.—The neglect or failure of a public officer to perform any duty which by law he is required to perform is an indictable offense, even though no damage is caused by the default, and a mistake as to his powers, or with relation to the facts of the case, is no protection.

OFFICE AND OFFICERS—CRIMINAL LIABILITY FOR NEGLECT.—Directors or overseers of the poor, who knowingly bind a pauper under their charge to service with a cruel master, and continue him in such service when they know, or ought to know, that his health is seriously impaired and his life endangered thereby, are guilty of such breach of duty as constitutes a misdemeanor in office, and subjects them to criminal liability, without proof of notice to them of each specific act of cruelty contributing to the distress of their victim.

PUBLIC OFFICERS—MISDEMEANORS IN OFFICE.—A public officer, after the expiration of his term, may be prosecuted and punished for a misdemeanor committed while in office.

John Hays, J. W. Wetzel, W. A. Kramer, and M. C. Herman, for the appellant.

W. J. Shearer, F. Maust, and J. E. Barnits, district attorney, for the commonwealth.

[41] MCCOLLUM, J. James Coyle, appellant, Michael Seavers, and John H. Rhoads were jointly indicted and tried for neglect of their duty as directors of the poor and of the house of employment for Cumberland county. A verdict of guilty was rendered by the jury, sentence was suspended as to Seavers and Rhoads on their payment of one-fourth of the costs, and Coyle was sentenced to pay a fine of one hundred dollars and three-fourths of the costs. The pith of the complaint against them was that they neglected [42] to discharge a duty which, in their official capacity, they owed to Joseph N. Diller, a poor and infirm child, aged seven years, who was a legal charge upon the county of Cumberland, and that, in consequence of their neglect, he died. In the first count of the indictment they were charged with having knowingly permitted him to be grossly maltreated by the person to whom he was apprenticed by them, and in the second count thereof, with having, while he was in their charge and under their care, willfully neglected to provide him with reason-

able and necessary food and clothing, and otherwise abused and ill-treated him. The evidence produced on the trial was clearly sufficient to warrant the conclusion that the death of the child was hastened by, if it was not solely attributable to, the treatment he received while in the custody of Lafferty, to whom he was bound by them on the 4th of June, 1891, for a term of fourteen years. It was also sufficient to sustain a finding that, before they committed the child to the care of Lafferty, they knew, or ought to have known, that the latter was not a proper person to have control of the former. Boyer, who was their representative in the arrangement under which the child was left at Lafferty's, six weeks before he was indentured, was advised by persons in the neighborhood that it was an unsafe place for a boy of his years. The testimony of Underwood and Fink on this point showed that they gave him information in respect to the character of Lafferty and his family, and their harsh treatment of a child in their care, which would have prevented any prudent person from committing a boy of tender years to their custody. A parent so informed would not have surrendered his or her child to their possession and control without an investigation which demonstrated that the charges against them were groundless. The care which a parent ought to exercise under such circumstances devolved upon the directors when young Diller became a charge on their district, and there is reason to believe that, if they had faithfully performed the duty thus cast upon them, he would not have been subjected to the cruel treatment which appears to have been responsible, in some degree at least, for his untimely death. But it is manifest from the testimony that they did not exercise the care enjoined by the law, and that they were negligent in binding him to Lafferty and in their failure to institute proceedings to cancel the indenture. [48] We need not repeat or discuss the testimony descriptive of the neglect and cruelty to which the child was subjected. It is sufficient to say of it that, in our opinion, it fully sustained the charges made in the first and second counts of the indictment.

It is contended that the indictment does not charge an offense known to the criminal law; that the directors are not indictable under section 42 of the act of June 13, 1836, Public Laws, 550, because the office of overseer of the poor is abolished in Cumberland county, and that they cannot be prosecuted under section 90 of the act of March 31, 1860,

Public Laws, 405, because it appears from the indictment and the testimony that the maltreatment complained of was after they left the child with Lafferty, and was inflicted by him and his family. The counsel for the commonwealth agree with the counsel for the defendants that this case is not governed by the statutes referred to; but the former maintain, and the latter deny, that the matters charged in the indictment constitute a common-law misdemeanor.

We think the contention of the defendants that the common law does not hold them criminally liable for a willful neglect or refusal to discharge their duties as directors is unsound. In 19 American and English Encyclopedia of Law, page 504, the rule on this subject is stated thus: "The neglect or failure of a public officer to perform any duty which by law he is required to perform is an indictable offense, even though no damage was caused by the default, and a mistake as to his powers, or with relation to the facts of the case, is no protection." In 1 Russell on Crimes, page 80, it is said that "it is an indictable offense in the nature of a misdemeanor to refuse or neglect to provide sufficient food or other necessaries for any infant of tender years unable to provide for and take care of itself (whether such infant be child, apprentice, or servant) whom the party is obliged by duty or contract to provide for, so as thereby to injure its health." In 2 Archbold's Criminal Pleading and Practice, page 1365, it is said that "an overseer of the poor is indictable for misfeasance in office, as if he relieves the poor where there is no necessity for it: *Tawney's case*, 16 Vin. Abr. 415; or if he misuse the poor, as by keeping and lodging several poor persons in a filthy and unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity [44] of the weather: *Rex* v. *Wetherill*, Cald. 432; or by exacting labor from them when they are not able to work: *Rex* v. *Winship*, Cald. 76. And if overseers conspire to marry a poor woman big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted: *Rex* v. *Compton*, Cald. 246. And for most breaches of their duty overseers may be punished by indictment or information." In Pennsylvania overseers of the poor have been indicted, convicted, and sentenced for a misdemeanor in office in selling the keeping of paupers by public

vendue or outcry to the lowest bidder: *Overseers of Milton* v. *Overseers of Williamsport*, 9 Pa. St. 48, 49.

It is a wise policy which exacts from a public officer, intrusted with the care of the poor persons in his district, faithful and humane administration of the laws enacted for their relief. In the proper enforcement of such laws they have considerate and kind treatment and a comfortable maintenance. Their inability to provide for themselves is not a crime, nor any excuse for neglecting or maltreating them. As charges upon the district, they are entitled to have from it wholesome food and comfortable clothing, and a sufficiency of both. If they are of tender years, or from any cause unable to work, it is an act of cruelty to exact from them the performance of tasks which are beyond their strength and injurious to their health. It is culpable negligence in an officer representing the district charged with their support to bind an infant pauper to service with a person whose parsimony and cruelty in the treatment of poor children committed to his care were well known in the neighborhood in which he lived. Inquiry in respect to the character of the master is a duty, and, where he resides in a county outside of the district in which the pauper is settled, and is personally a stranger to the officer, the nonobservance of it is a misdemeanor. It seems to us also that it is his duty, after the child is bound to service, to see that the covenants of the master are substantially complied with, and, if these are willfully and persistently violated to the injury of the child's health, to institute the necessary proceedings to set aside the indenture.

In the present case the directors, with knowledge of Lafferty's character, bound young Diller to him, and, with knowledge of [45] the abuse the child was receiving from his master, refused to take any measures to rescue him from the cruelty to which he was subjected by their own negligent act. If, as they contend, their conduct is not condemned in terms by any of our statutes in relation to the care of the poor, it is gratifying to know, as we have seen, that the common law holds them responsible for it as a misdemeanor in office.

The several specifications of error which complain of the admission of evidence of deprivation and cruelty after the 5th of September, 1891, and of the denial by the court of the defendant's motion to strike out such evidence, are not sustained. The evidence referred to showed a continuance of

the ill usage they approved, by their refusal to take any measures to prevent the master's persistence in it, and was descriptive of the consequences of their negligence. With their knowledge of his character and of his maltreatment of the helpless boy they committed to his care they should have anticipated what followed. Having declined, when requested, to intervene in behalf of the suffering child, and thus impliedly sanctioned the master's abuse of him, they had no reason to expect that he would receive better treatment thereafter. In plain violation of their duty to the child and the district they represented they knowingly bound him to service with a cruel master, and continued him in it when they knew, or ought to have known, that his health was seriously impaired and his life endangered by it. It was this breach of duty which constituted their offense, and it was competent for the commonwealth to introduce evidence descriptive of its results without proving personal notice to them of each specific act of cruelty which contributed to the distress of their victim.

We are not able to discover in the remaining specifications any thing which calls for the reversal of the judgment. The contention that the appellant cannot be prosecuted and punished for misdemeanor in office because his term has expired is not supported by reason or authority, and certainly he ought not to complain that, while he was liable for all the costs, he was required to pay only three-fourths of them.

The specifications of error are overruled, and the judgment is affirmed.

OFFICERS—CRIMINAL LIABILITY FOR NEGLECT OF DUTY.—It is perfectly well settled that the neglect, failure, or omission of a public officer to perform any duty while in office, which by law he is required to perform, is a crime for which he may be indicted, convicted, and punished. Every culpable neglect of public duty enjoined on such officer, either by common law or by statute, is an indictable offense: *State* v. *Buxton*, 2 Swan, 57; *Robinson* v. *State*, 2 Cold. 181; *State* v. *Williams*, 12 Ired. 172; *State* v. *Startup*, 39 N. J. L. 423; *State* v. *Kern*, 51 N. J. L. 259; *Regina* v. *Neale*, 9 Car. & P. 431; *Rex* v. *Cummings*, 5 Mod. 179; *Regina* v. *Buck*, 6 Mod. 306; *Rex* v. *Hemmings*, 3 Salk. 187. This rule is especially well established when the duty required is of a ministerial or other like nature, and no discretion is reposed in the officer: *Rex* v. *Osborne*, 1 Comyn, 240; *Commonwealth* v. *Gentner*, 17 Serg. & R. 135; *People* v. *Norton*, 7 Barb. 477. When the duty imposed is not absolute, but conditional, dependent upon the honest exercise of judgment and discretion by the officer called upon to perform it, an omission to perform is not *per se* an indictable offense: *State* v. *Williams*, 12 Ired. 172; *State* v. *Powers*, 75 N. C. 281.

A public officer intrusted with definite powers to be exercised for the ben-

efit of the community, who negligently abuses or fraudulently exceeds them, is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong which are committed to him as instruments of benefit to the citizen, and of safety to his rights: *State* v. *Glasgow*, 1 Conference R. 38; 2 Am. Dec. 629. Statutes exist in a majority of the states which make a willful omission and neglect by a public officer to perform a duty pertaining to his office, enjoined by law upon him while in the discharge of his official duties, a misdemeanor: *Ex parte Harrold*, 47 Cal. 129. But the failure of a county treasurer to reside at the county seat of his county is not within the meaning of such a statute: *Ex parte Harrold*, 47 Cal. 129. Officers of a municipal corporation are public officers within the meaning of a statute of this nature: *People* v. *Bedell*, 2 Hill, 196.

The mayor and aldermen of a municipal corporation are liable to be indicted and punished individually for failure to keep in repair the public streets of the town: *Hill* v. *State*, 4 Sneed, 443; but municipal officers, such as commissioners of highways, are not liable for neglect in failing to make repairs in streets or highways, unless they have funds or other means to defray the expense of such repairs: *People* v. *Adsit*, 2 Hill, 619.

A jailer may be indicted, convicted, and punished for permitting the jail to become so filthy as to endanger the comfort, health, and lives of the prisoners: *McBride* v. *Commonwealth*, 4 Bush, 231; overruling *Commonwealth* v. *Mitchell*, 3 Bush, 39. A public inspector of provisions may be indicted for a misdemeanor for refusing to perform his duty: *Commonwealth* v. *Genther*, 17 Serg. & R. 135. Although a justice of the peace may be indicted for refusing to issue a warrant for the arrest of a felon, the indictment must charge that the felony was committed in his presence, or that an affidavit of its commission was tendered to him: *State* v. *Leigh*, 3 Dev. & B. 127.

An indictment lies against a constable for negligently allowing a prisoner to escape: *State* v. *Mayberry*, 3 Strob. 144; and if a constable assumes to act without giving a bond he is liable to indictment for violation of duty: *United States* v. *Evans*, 1 Cranch C. C. 149. A peace officer is subject to indictment for failing to actively assist in suppressing a riot: *Republica* v. *Montgomery*, 1 Yeates, 419.

A clerk of court is liable to criminal prosecution for refusing to pay over to the county treasurer money to which the latter is entitled, and which the former has collected: *Tucker* v. *State*, 16 Ala. 670. The refusal of a county officer to turn over his books on the expiration of his term of office to his successor is indictable as a misdemeanor: *Howze* v. *State*, 59 Miss. 230. In such case the crime is complete if, at the expiration of his term, he fails to turn over the books, and his subsequent refusal does not relieve him, but is admissible against him to throw light on his previous neglect: *Howze* v. *State*, 59 Miss. 230.

A clerk of a county court may be indicted for issuing a marriage license for the marriage of an infant without the consent of the parent or guardian, and contrary to the statute, and a mistake of the clerk as to his powers, or in relation to the facts is no protection: *Commonwealth* v. *Hill*, 6 Leigh, 636.

LIABILITY FOR CORRUPT CONDUCT.—A ministerial officer who acts corruptly in relation to duties pertaining to his office is criminally responsible therefor, whether he acts under the law or without the law: *State* v. *Powers*,

75 N. C. 281; *State* v. *Leach*, 60 Me. 58; 11 Am. Rep. 172; *State* v. *Wedge*, 24 Minn. 150.

The members of a board of supervisors in examining, settling, and allowing county accounts are charged and intrusted with definite duties and powers to be performed and exercised for the benefit of the community, and, if they wickedly abuse or fraudulently exceed such powers, they are punishable criminally for their acts: *People* v. *Stocking*, 50 Barb. 573. Commissioners of excise whose duties are plainly defined by statute are liable to indictment for willfully and corruptly granting a license to a person to sell spirituous liquors, knowing him to be unqualified to hold such license: *People* v. *Norton*, 7 Barb. 477.

A justice of the peace or other magistrate is not liable criminally for error of judgment in a judicial proceeding: *State* v. *Porter*, 2 Tread. Const. 694; *Downing* v. *Herrick*, 47 Me. 462. Gross incompetency in a magistrate is not of itself evidence of official corruption or personal depravity, and an erroneous judicial decision, unaccompanied by any fact or circumstance indicating a corrupt or dishonest motive, is wholly insufficient support to a charge of criminality or corrupt misconduct in office: *Quinn* v. *Scott*, 22 Minn. 456. Although it has been held that justices of the peace are not liable criminally for corrupt official and judicial acts: *State* v. *Campbell*, 2 Tyler, 177; *State* v. *Odell*, 8 Blackf. 396, it is generally maintained that such an officer is liable criminally for corrupt official acts, oppression, or willful misdemeanors in office: *State* v. *Gardner*, 2 Mo. 23; *State* v. *Johnson*, 2 Bay, 385; *State* v. *Porter*, 2 Tread. Const. 694; *Commonwealth* v. *Alexander*, 4 Hen. & M. 522; *Jacobs* v. *Commonwealth*, 2 Leigh, 709; *People* v. *Coon*, 15 Wend. 277. It is generally conceded that unless a criminal remedy is given by constitutional or statutory enactment, public officers, such as legislators, judges of courts of record, jurors, or other officers acting judicially or intrusted with responsible discretionary duties are not liable to ordinary criminal prosecution, by indictment for official misconduct or corruption while in office, for the reason that they are subject to impeachment or other punishment outside the ordinary process: Mechem's Public Officers, sec. 1023; Bishop on Criminal Law, sec. 459, et seq; 19 Am. & Eng. Ency. of Law, 503. And this rule has at least on one occasion been applied to corruption by a justice of the peace: *Taylor* v. *Doremus*, 16 N. J. L. 473. *De facto* officers acting ministerially are liable criminally for neglect in performing the duties of their office in the same manner as officers *de jure* would be under the same circumstances: *State* v. *Long*, 76 N. C. 254. The same rule applies to corrupt official acts performed by a *de facto* justice of the peace: *State* v. *Cansler*, 75 N. C. 442. "A person who undertakes an office and is in office, though he might not have been duly appointed, and therefore, may have a defeasible title, or not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect": *State* v. *McEntyre*, 3 Ired. 171–174.

GREENWAY v. CONROY.

[160 PENNSYLVANIA STATE, 185.]

MASTER AND SERVANT—MINOR EMPLOYEES—NEGLIGENCE.—In an action by a minor employee over fourteen years of age to recover damages from his employer for personal injury it cannot be assumed, as a matter of law, that such minor with six months' experience in a machine-shop is incapable of forming a judgment of the danger of going up a ladder to put a belt on a pulley, especially when he has the aid of a warning given by an older and more experienced workman.

MASTER AND SERVANT—MINOR EMPLOYEES—MEASURE OF RESPONSIBILITY. The measure of a child's responsibility is his capacity to see and appreciate danger, and, in the absence of evidence of lack of capacity, he is held to such measure of discretion as is usual in those of his age and experience. This measure varies with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen years. That is simply the point at which the law, founded upon experience, changes the presumption of capacity, and casts upon the minor the burden of showing his personal want of experience, prudence, foresight, or strength usual in those of his age.

MASTER AND SERVANT.—LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANTS. An employee is not entitled to recover damages from his employer for personal injuries caused by the negligence of a fellow-workman, who has no general authority or control over the men, and differs from them only in that a part of the work requiring to be marked and laid out first passes through his hands, and that upon rare occasions he has charge of the shop when the employer, who is his own superintendent, is away, if, at the time of the accident, the employer is present and in charge of the shop.

E. A. Ballard, for the appellants.

L. R. Fletcher and George Robinson, for the appellee.

188 FELL, J. The plaintiff, a boy over fourteen years of age at the time of his injury, had been employed for six months in the machine-shop of the defendant. The shop was a small one, in which but seven or eight men were employed, and was under the direct management of the defendant, whose time was spent there in superintending the work. On the morning of the accident the plaintiff had been engaged at work outside the shop, and was told by the defendant to go to McNamara, who would tell him what to do. He was directed by McNamara to drill some fastenings. According to the plaintiff's testimony he found the belt off the machine he was to use, and asked McNamara to put it on, and was told by him to do it himself. He procured a ladder in order to reach the shafting, and, in his attempt to put the belt on the pulley, his hand was caught and seriously injured.

It was denied by the defendant's witnesses that the plaintiff had been told to put the belt on, and two of them testified that when he was going up the ladder for that purpose he was told of the danger, and cautioned not to attempt it, and that he persisted notwithstanding this warning.

It was McNamara's business to put the belts on the pulleys. He was the oldest workman in the shop, and had charge of the belts. He laid out the work for the other employees, and, in the absence of the defendant, was looked to by them for direction.

The question of contributory negligence on the part of the plaintiff, and the question whether McNamara was more than a fellow-servant for whose negligence the defendant would not be liable, are fairly raised by the testimony.

Neither the first nor the third of plaintiff's points presented the question of contributory negligence, and the effect of their affirmance without qualification or explanation was to withdraw that subject from the consideration of the jury.

The learned judge of the common pleas, in the course of a very clear and impartial charge, said: "The plaintiff has a right to recover only for injuries that are caused by negligence that is properly chargeable to the employer. An accident caused by the negligence of the plaintiff himself in a case of this kind gives the plaintiff no right to a verdict." This we [189] think, however, does not correct the error of the affirmance of the points. The jury was not instructed as to what negligence might be properly chargeable to the employer, nor directed that there could be no recovery for injuries, the result of concurrent negligence.

There was testimony that the plaintiff before he went up the ladder was warned of the danger. We cannot assume that a boy over fourteen years of age, with six months' experience in a machine-shop, is incapable of forming a judgment of the danger of such an act, especially when he has the aid of the warnings of an older and more experienced person. As was said by Mitchell, J., in *Kehler* v. *Schwenk*, 144 Pa. St. 359, 27 Am. St. Rep. 633: "All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies of course with each additional year, and the increase

of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of his age."

The fourth specification of error is to the refusal of the court below to affirm the defendant's point: "Under all the evidence your verdict should be for the defendant." If there was testimony showing that McNamara was a vice-principal this point was properly refused; if, from all the testimony, it appeared that he was only a fellow-workman it should have been affirmed.

The plaintiff testified that McNamara was the superintendent and engineer; that "he was called the engineer," and took charge of the place when the defendant was away; but on cross-examination said that the defendant was around the shop all the time, seeing that everything went right. This is the only light thrown upon the subject by the plaintiff or his witnesses. All of the testimony shows that the defendant was in the building or the adjoining yard at the time of the accident, and was seldom away from the shop. The uncontradicted testimony of the defense is that McNamara was employed to work, not to superintend; that he was not even employed as a foreman, [100] but had his regular work like every other man in the shop; that it was his duty to run the engine, put on the belts, and mark fastenings that were to be drilled; he neither employed nor discharged workmen; he was clothed with no special authority; he had no general direction of the business or any part of it; he was not intrusted to perform a duty which the law imposes upon the employer, and which cannot be delegated by him except at his peril. He differed from his fellow-workmen only in this, that a part of the work which required marking and laying out first passed through his hands, and that upon occasions of rare occurrence when the defendant was away he had charge the shop.

On this occasion the defendant was not absent, and there is no ground for a pretense even that McNamara was in charge of the works. The direction of the defendant to the plaintiff to go to McNamara to be told what work to do must be considered as having relation to the kind of work he was accustomed to do from day to day, which was cleaning, japanning,

drilling, and counter-sinking, a part of which had first to be marked and prepared by McNamara. He was placed under the charge of McNamara, only as to the selection of his particular work. This direction was not a delegation by the defendant of his general authority over the plaintiff to another, and there was no more reason to suppose that the plaintiff would be told to put a belt on a moving pulley than that he would be required to run the engine.

There was nothing in the testimony to carry this case to the jury but the bare assertion of the plaintiff that McNamara was the superintendent, unaccompanied by any explanation of the nature of his duties or proof of a single fact to substantiate it. The uncontradicted testimony of the defense, resting not upon mere assertion, but upon proofs that were conclusive, shows that he was not the superintendent. This cannot properly be said to raise an issue of fact for a jury. On the one hand was the assertion of an opinion or conclusion; on the other the proof of the fact which demonstrated its error. Superintendents are not made by calling them such, but by the nature of their employment, their duties, and their work.

Aside from this it seems to be conclusive of the whole case that it is shown by the plaintiff's testimony that the defendant [191] was his own superintendent except at times of not frequent occurrence when he was called to the city, and that on this occasion he was present and in charge of the shop.

We are of opinion that the learned judge should have affirmed the defendant's point and directed a verdict for him.

The judgment is reversed.

MASTER AND SERVANT—LIABILITY FOR ACTS OF FELLOW-SERVANTS.—This question is fully discussed in *Jenkins* v. *Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note, with the cases collected.

MASTER AND SERVANT—LIABILITY FOR INJURY TO MINOR EMPLOYEE—CONTRIBUTORY NEGLIGENCE: See the note to *Rhodes* v. *Georgia R. R. etc. Co.*, 20 Am. St. Rep. 368. A minor servant, properly instructed concerning the danger of his employment, thereafter stands on the same plane with other servants with respect to the risks of the employment: *Fisk* v. *Central Pacific R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and extended note. Proof that a minor servant had done the work, in the doing of which he was injured, for some time prior to the accident and of the number of times he had done it, may be properly considered by the jury in determining whether the master was negligent in requiring him to continue it: *Hinckley* v. *Horazdowsky*, 133 Ill. 359; 23 Am. St. Rep. 618, and note. See *Ciriack* v. *Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 438. Ordinary care for minors is that degree of care which children of the same age are accustomed to exercise under similar circumstances: *Rolling Mill Co.* v. *Corrigan*, 46 Ohio St. 283;

15 Am. St. Rep. 596. So the precautions which a master is bound to take with reference to his minor servants must be graduated with reference to their ignorance or experience, so as to make them fully aware of the danger to which they may be exposed: *Smith* v. *Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699; *Chicago etc. Brick Co.* v. *Reinneiger*, 140 Ill. 334; 33 Am. St. Rep. 249, and note, with the cases collected.

DEACLE *v.* DEACLE.

[160 PENNSYLVANIA STATE, 206.]

PROCESS—RETURN—ALTERATION.—It is not competent for a sheriff to alter or amend a return of process which has been made. If the writ bears his return, and has been delivered to the prothonotary, the sheriff's control over it is ended, and any alteration by him without leave of court is unauthorized and void.

PROCESS—RETURN—ALTERATION—PRACTICE.—The question whether there has been an alteration by the sheriff of a return made, or only a refusal by him to accept a return prepared by his deputy, but not actually made, and the substitution by him of a new one in place of it while the writ is still in his hands, is a question for the court, before which the case is heard, to decide.

A. A. Vosburg and W. S. Hulslander, for the appellant.

A. D. Dean and G. B. Davidson, for the appellees.

[208] FELL, J. The plaintiff in this case brought an action of ejectment against the defendants, and the deputy sheriff who had the writ was told to serve it on Thomas Deacle as their agent. He made the service as directed, and wrote the return to that effect on the back of the writ. The plaintiff's attorney, having seen the return on the writ when it was in the office of the sheriff or the prothonotary, entered a rule of reference, under which arbitrators were chosen, who made an award. The sheriff, [209] under the advice of his counsel, and before the return day, prepared a new return of *nihil habet* as to the defendant, and this return was pasted over the return first written.

Two rules to show cause were then granted by the court, one on motion of the defendants to set aside the award of arbitrators and the other on petition of the plaintiff to reinstate the original return. The first of these rules was made absolute and the second discharged; and this action of the court is assigned as error.

It is not competent for the sheriff to alter or amend a return which has been made. If the writ in this case bore

his return, and was delivered to the prothonotary, his control over it had ended, and any alteration by him without leave of the court was unauthorized and invalid.

The question whether there had been an alteration by the sheriff of a return made, or only a refusal by him to accept a return prepared by his deputy, but not actually made, and the substitution by him of a new one in place of it while the writ was still in his hands, was heard by the court of common pleas on depositions, and decided in favor of the defendants. This question of fact was properly before the court, and the duty and responsibility of deciding it rested there.

If there was no service of the writ on the defendants it follows that all proceedings under the rule of reference were void, and the award of the arbitrators was properly set aside.

The judgment is affirmed.

PROCESS—RETURN—AMENDMENT BY OFFICER.—A sheriff may amend his return of process so as to make it speak correctly, even after suit has been brought for the penalty imposed for a false return: *Steakman* v. *Greenwood*, 113 N. C. 355. A sheriff may, even after judgment, by leave of the court, amend his return on a writ *nunc pro tunc* in order to show that the writ was served on the defendant before judgment was rendered: *Heflin* v. *McMinn*, 2 Stew. 492; 20 Am. Dec. 58, and note. A sheriff may, by leave of the court, amend after his term has expired a return of service made by him while in office: *Beutell* v. *Oliver*, 89 Ga. 246; *Jeffries* v. *Rudloff*, 73 Iowa, 60; 5 Am. St. Rep. 654, and note; *Shenandoah Valley R. R. Co.* v. *Ashby*, 86 Va. 232; 19 Am. St. Rep. 898, and note. See the note to *Reinhart* v. *Lugo*, 21 Am. St. Rep. 56, and the extended note to *Malone* v. *Samuel*, 13 Am. Dec. 173.

REIFF *v.* MACK.

[160 PENNSYLVANIA STATE, 265.]

EXEMPTIONS—PENSION MONEY.—Attachment does not lie against the proceeds of a pension check deposited by the pensioner with a bank for collection, and by it collected and placed to his credit as a deposit.

A. B. Rieser and Morris H. Schaffer, for the appellants.

W. M. Goodman and J. K. Grant, for the appellee.

273 Per CURIAM. According to the undisputed evidence the money attached was part of the proceeds of the pension check which defendant deposited with the garnishee bank for collection. It was subject to his check, and was in fact part of his pension money which, as cash, had not yet come into his hands. In view of the undisputed facts the learned judge

of the common pleas was clearly right in holding that, under the act of Congress, the money was not attachable. That act provides that "no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This case is clearly ruled by the principle recognized in *Holmes* v. *Tallada*, 125 Pa. St. 133, 11 Am. St. Rep. 880, and other cases cited in the opinion of the court below.

The decree dissolving the attachment is therefore affirmed, and the appeal is dismissed, with costs to be paid by the appellants.

EXEMPTIONS—PENSION MONEY.—A pensioner of the United States may, under the United States Revised Statutes, section 4747, use the money received from his pension in any manner he may see proper, free from the attacks of creditors: *Holmes* v. *Tallada*, 125 Pa. St. 133; 11 Am. St. Rep. 880, and note. But pension money from the United States is not exempt from attachment or execution after it is received by the pensioner, and by him deposited in the hands of a third person for safe-keeping: *Roselle* v. *Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591, and extended note. Pension money is not exempt where the pensioner sells the pension drafts to a bank and is credited in his general account with the proceeds, and portions of the same are from time to time checked out by him: *Crans* v. *White*, 27 Kan. 319; 41 Am. Rep. 408, and extended note. Pension money is not exempt from the claims of creditors after it actually comes into the hands of the pensioner: *Friend* v. *Garcelon*, 77 Me. 25; 52 Am. Rep. 739.

STRUNK *v.* FIREMAN'S INSURANCE COMPANY.

[160 PENNSYLVANIA STATE, 345.]

INSURANCE—VACATION OF PREMISES—NOTICE, WHEN MUST BE GIVEN.—A policy of fire insurance providing that the insurer shall not be liable for loss "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company and consent indorsed thereon," notice must be given within a reasonable time after vacancy, and if so given the policy remains in force until consent is refused by the insurer. In such case immediate notice must be construed to mean notice within a reasonable time, in view of the circumstances and positions of the parties in respect to means of communication with each other. What would be reasonable time as between the parties living in the same city or having ready means of communication would be very unreasonable if applied to an insured who lives a considerable distance from a postoffice, or a railroad, or the agent of the company who has placed the insurance.

INSURANCE—NOTICE OF VACATION OF PREMISES—ACTS OF AGENT AFTER TERMINATION OF AGENCY.—Though the failure of the agent of the insurer who has placed the insurance to notify the insured of the termination of his agency, when requested to notify the insurer of a vacation of the premises in compliance with a policy requiring immediate notice of such vacation to be given, does not continue the agency as far as the insured is concerned, yet the acts performed by such supposed agent for the purpose of transmitting notice to the insurer is proper evidence to show how notice was sent, and that reasonable promptness and diligence was exercised by the insured in giving notice.

ASSUMPSIT on an insurance policy. Judgment for plaintiff. Defendant appealed.

W. W. Watson and H. J. Kotz, for the appellant.

Charles B. Staples, for the appellee.

384 FELL, J. The policy of insurance issued by the defendant contained a provision relieving it from liability for loss "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company and consent indorsed thereon." The house insured was occupied by a tenant, who moved out on the 4th of April. On the same day the plaintiff requested her husband to go to Stroudsburg, thirteen miles distant, and give notice of the vacation of the house to R. M. Jacoby, whom she supposed to be the agent of the company, and ask him to obtain the consent of the company. Her husband complied with her request on the 6th. Mr. Jacoby had, until a month previous, been the agent of the company, and had placed the insurance. He did not notify the plaintiff's husband that he no longer represented the company, but agreed to give the necessary notice and obtain the consent desired. On the 7th he called on Mr. Bell, an insurance agent, who had business relations with the state agents of the company who lived at Philadelphia, and requested him to notify them. Mr. Bell on the 8th wrote as desired, and his letter was received on the 9th. The agent at Philadelphia at once replied, refusing a permit. On the 8th the house was destroyed by fire.

The sixth assignment of error raises the question of the right 385 of recovery under the terms of the policy after the house became vacant, and the disposition of it is conclusive of the case. The learned judge, in the course of his charge, said: "Vacancy did not *ipso facto* avoid the policy by its terms; vacancy without immediate notice to the company and consent indorsed thereon did. The giving of notice was the

duty of the insured; the giving of consent and the indorsing of it on the policy were optional with the company."

The jury was instructed that immediate notice in the policy meant notice within a reasonable time, and that, after vacancy, followed by notice in a reasonable time, the policy remained in force until consent was refused by the insurer.

We see no error in this instruction. Conditions involving forfeiture and exemption from liability should be strictly construed against the insurer, but the most liberal construction would not relieve the defendant in this case. The evident and only reasonable construction of the clause in question is that given by the learned trial judge. In case the premises became vacant, immediate notice was to be given, and it was then optional with the insurance company to continue or cancel the policy. The fact of vacancy did not work a forfeiture of the policy, but it imposed upon the insured the duty of notice, and gave to the insurer the right of cancellation. There would be no reason for notice and consent if the policy were already void. Immediate notice must be construed to mean notice within a reasonable time, in view of the circumstances and positions of the parties. What would be reasonable time when the parties live in the same city or town, or have means of ready communication, would be very unreasonable if applied to the parties to this suit, one of whom lived on a farm six miles from a postoffice, twelve miles from a railroad, and thirteen miles from the town in which the agent of the company, who had placed the insurance, and to whom she would naturally look for information, resided.

The fourth assignment of error is to the instruction that although Mr. Jacoby's agency had terminated, yet, so far as concerned the plaintiff, he was still the agent of the company, for the reason that she had not been notified of the changed relation. The thirteenth assignment is to the same effect. This was not an accurate statement of the law, and if it were apparent [sic] that it might have led the jury to a wrong conclusion we should feel obliged to send the case back for retrial. This error, however, does not seem to be fatal. Jacoby was not, on April 6th, the agent of the company, and the plaintiff, in her dealings with him, took all risks upon that point; but he became her representative for the purpose of transmitting notice, and acting for her he set in motion the agencies which resulted in notice to the insurer on the 9th. What he did was properly in evidence, as showing how notice was sent,

and also as showing good faith and diligent effort on the part of the plaintiff.

The only remaining assignment of error that requires notice is the seventeenth, which relates to the overruling of an objection to the offer by the plaintiff of proofs of loss, and the sufficient answer to this is, that they were offered and admitted for a proper purpose, and read to the jury without objection made at the time.

The judgment is affirmed.

INSURANCE—CONDITION AGAINST VACANCY OF PREMISES.—NOTICE: See the note to *Cook* v. *Continental Ins. Co.*, 35 Am. Rep. 443. A policy of insurance on a dwelling, containing a stipulation that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid," will become void if the building is vacated, and no notice is given except to an agent who has no authority to receive such notice: *Harrison* v. *City etc. Ins. Co.*, 9 Allen, 231; 85 Am. Dec. 751. To the same effect see *O'Brien* v. *Prescott Ins. Co.*, 134 N. Y. 28. Under a policy of insurance on leased premises, which contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy: *Doud* v. *Citizens' Ins. Co.*, 141 Pa. St. 47; 23 Am. St. Rep. 263, and note.

BEHLING *v.* SOUTHWEST PENNSYLVANIA PIPE LINES.

[160 PENNSYLVANIA STATE, 359.]

NEGLIGENCE—PROXIMATE CAUSE—QUESTION OF LAW.—The question of proximate cause upon undisputed facts is for the court and not for the jury to determine.

NEGLIGENCE.—PROXIMATE CAUSE is one which in actual sequence, undisturbed by any independent cause, produces the result complained of.

NEGLIGENCE—PROXIMATE CAUSE—BURSTING OF PIPE.—A pipe line company is not responsible for the loss of a house by fire occasioned by a flow of burning oil from adjoining property upon the pipe line, causing it to burst and throw the burning oil upon the house. In such case the burning oil, and not the pipe line is the proximate cause of the loss.

PIPE LINE COMPANIES—CONSTRUCTION OF PIPE LINE.—The bursting of a pipe line, caused by a flow of burning oil over it from adjoining property, is not such element of danger as the pipe line company is bound to foresee and provide against for the protection of the property of third persons when constructing its line.

B. Crumrine, M. F. Elliott, H. McSweeney, and E. E. Crumrine, for the appellant.

J. F. Taylor and W. F. McIlvaine, for the appellee.

[363] WILLIAMS, J. The house of the plaintiff, situated near the banks of Robb's run, in the borough of McDonald, was burned on the night of the 10th of November, 1891. The defendant company was engaged in transporting oil from the wells of the McDonald oil field to its storage-tanks, and to the markets in Pittsburgh and other cities. The plaintiff alleges that the burning of her house was due to the negligence of the defendant in laying its lines, and brings this action to recover its value. The important facts are not in controversy. The McDonald field extends over a large region, covering the country on both sides of the run, and extending over the tops of the hills above it. Many of the wells were unexpectedly large, and considerable oil was lost before the field was accommodated with lines sufficient for its transportation. There were several wells above Mrs. Behling's house, the waste oil from which had run into and down Robb's run before the lines reaching there could be laid. To secure and remove the product of these wells, a four-inch line [364] was first laid up the run and along its course. This proved insufficient, and a three-inch line was placed along by its side. The oil from the wells on the side and top of the hill was drawn into these lines and conveyed out of the field. Among the wells served by these lines was one known as the Butler well, which was some five or six hundred feet from the Behling house, farther up the hill and near the run. Another was known as the Church well. This was on the opposite side of the run, some distance from it, and connected with the pipe lines along the run by a branch made of two-inch pipe. The point of junction was near one hundred feet from the house, and, as we understand, lower down the stream. On the night of the 10th of November, 1891, the Butler well took fire. The derrick, engine-house, and machinery were destroyed, and the fire was communicated to the tanks, in which about one hundred and fifty barrels of oil were standing at the time. The tanks soon gave way, and the burning oil flowed into Robb's run, and began to descend along its course towards the Behling house and the built-up part of the town lower down the stream. The people turned out in force to prevent the threatened general conflagration, and built a dam across the run to confine the oil, so that it might burn there, instead of descending to the village. The fiery flood passed the Behling house and reached the dam near the point where the branch pipe from the Church well connected with

the four-inch line. The intense heat, caused by the burning oil in and just above the dam thrown up by the citizens to stop the descent of the oil, caused the branch pipe to burst, and for a few moments, until the oil could be shut off, a spray of oil was thrown towards and upon one corner of the house. The house took fire (but whether before or after the bursting of the pipe was one of the disputed questions of fact in the case), and was wholly consumed.

Two questions arise on these facts: First, was the laying of the defendant's pipe along Robb's run the cause of the destruction of the plaintiff's house by fire? If it was, then the second question is, whether the burning of the house was such a circumstance as, in the exercise of a proper measure of prudence, should have been foreseen as a natural or probable consequence of the location of the lines along the run? The learned judge of the court below submitted both questions to the jury, and sees both were found in favor of the plaintiff. The first question rested on facts that were undisputed, and was therefore for the court and not for the jury: *Pittsburgh etc. Ry. Co.* v. *Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580; *Township of West Mahanoy* v. *Watson*, 112 Pa. St. 574; 56 Am. Rep. 336. The pipe line was laid for the transportation of oil for the producers who were within reach of it. This was a lawful purpose, undertaken by a corporation organized according to law, and carried on in the usual manner. No complaint is made of the material employed, nor of the manner in which the line was laid. It is not alleged that its use for the purposes for which it was intended was dangerous to the property of the plaintiff, nor that it might not have been operated for years without danger to any one. There is no negligence charged in either the construction or operation of the line. What is complained of is that it was located where it could be reached by the burning oil from the Butler well. But the lines following the course of the run did not give way notwithstanding the heat to which they were subjected. The two-inch branch coming from the Church well was what gave way, at or near its connection with the line. This connection was not far from the bridge and the dam built by the citizens to check the flow of the oil down the run, and it was subjected to greater heat for that reason than it would otherwise have been. The flames from the burning oil were much higher and fiercer by reason of the accumulation of oil in the dam,

reaching up, as some witnesses say, to a height of twenty feet or more. This stream of burning oil descending the run and passing within twenty-five feet of the plaintiff's house was, as to the pipe lines, an independent, intervening cause. But for this the two-inch branch would not have burst, and, if it had, would have done no substantial injury. This is not a case where concurrent causes are involved, for the pipe line without the stream of burning oil was harmless. A stack of hay or straw standing on the bank of the run would have been fired by the flames from the oil, and might have communicated fire to the plaintiff's house and caused its destruction; but I apprehend it would not be contended that the stack was a concurring cause. In one sense it would have been the immediate cause of the burning of the house, as it was the instrument by which the fire was communicated to it; but the *causa causans*, the true proximate [sic] cause of the burning of the house, would nevertheless be the descending flood of fire that kindled a flame in every inflammable object along its course. This branch line, like the stack of hay or straw, was a harmless object in itself, having no tendency to endanger the plaintiff's property. The fire came down the run, a wholly independent agency, and, confined by the temporary dam, the heat became so great as to destroy the connection, and set the escaping oil on fire. If the oil did reach and set fire to the house, the parallel between it and the stack is complete. It became dangerous only when it was destroyed by an independent intervening agency or cause, and because of its destruction. The pipe lines were not, therefore, the efficient or proximate cause of the plaintiff's loss. A proximate cause is one which in natural sequence, undisturbed by any independent cause, produces the result complained of. In this case the sequence led, not from the pipe lines or the branch from the Church well, but from the bursting of the tanks at the Butler well and the descent of the burning oil therefrom. Nor was the pipe line a concurring cause; for neither in its construction nor in its operation did it tend to produce the result. It did not run with the burning oil to affect the destruction of plaintiff's house, but it became the means or instrument of communicating the fire, under the compulsion of an independent efficient cause, by which the destruction was accomplished. The pipe line, like the stack we have supposed to stand on the bank of Robb's run, was an intermediate object through which the burning oil might

communicate its fire to any other object that was within reach. It was the duty of the learned judge, upon the admitted facts of this case, to determine the question of proximate cause, and not to send it to a jury: *South Side Passenger Ry. Co.* v. *Trich*, 117 Pa. St. 390; 2 Am. St. Rep. 672.

This is decisive of this case and renders the discussion of the second question unnecessary. The rule is well settled, however, that one is liable for such consequences of his acts as he should, in the exercise of reasonable prudence, foresee as probable or natural. The question is, Did he know, or had he the means of knowing, that the result complained of would be likely to follow the action or undertaking upon which he was proposing to enter? What was the company that constructed this pipe line bound to anticipate and provide for? The answer must be, the [367] natural and probable consequences both of its construction and operation. It was bound, therefore, to care in the selection of the material, in securing good workmanship in its construction, and competent superintendence in its operation. The burning of the Butler well was not a probable or natural consequence of the laying of the pipe line. It had no relation whatever to the line. It was an accident to the property of another over which the owners of the line had no control. It is true that such accidents occasionally happen in an oil-producing region, and that the owners of the pipe line, like the owners of buildings, have such possibilities to reckon with. But a pipe line to carry oil must reach the wells that provide it, and, in so doing, the risk of injury from the burning of a well is one of the unavoidable risks incident to the business. We think the court below might well have disposed of the second question as a question of law, and instructed the jury that a casualty like the burning of the Butler well was not a consequence of the construction of defendant's lines; nor was the possibility of such an accident such an element of danger as the defendant was bound to foresee and provide against for the protection of the property of third persons along its line.

The judgment of the court below is reversed.

NEGLIGENCE—PROXIMATE CAUSE, WHEN QUESTION FOR COURT.—In cases where negligence is alleged, the question of proximate cause is ordinarily for the jury; but when the facts are not in dispute the question is for the determination of the court: *Bunting* v. *Hogsett*, 139 Pa. St. 363; 23 Am. St. Rep. 192, and note; *South Side etc. Ry. Co.* v. *Trich*, 117 Pa. St. 390; 2 Am.

St. Rep. 672; *West Mahoney Tp.* v. *Watson*, 113 Pa. St. 344; 2 Am. St. Rep. 604. See the extended note to *Gilson* v. *Delaware etc. Canal Co.*, 36 Am. St. Rep. 851.

NEGLIGENCE—PROXIMATE CAUSE—WHAT IS.—Proximate cause is that which is a natural and continuous sequence unbroken by any efficient intervening cause, producing the result complained of and without which the result would not have occurred: *Western Railway* v. *Mutch*, 97 Ala. 194; 36 Am. St. Rep. 179. This question is thoroughly discussed in the monographic note to *Gilson* v. *Delaware etc. Canal Co.*, 36 Am. St. Rep. 807–861.

COMMONWEALTH *v.* BREYESSEE.

[160 PENNSYLVANIA STATE, 451.]

MURDER—SELF-DEFENSE.—Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him.

MURDER—KILLING OF PERSON NOT INTENDED.—When one person forms a deliberate purpose to kill another, and fires a pistol at him for that purpose, the fact that the ball misses its intended victim and kills another person does not relieve the murderer.

MURDER—EVIDENCE—CREDIBILITY OF DEFENDANT.—On a trial for murder the extent to which the accused is contradicted by the witnesses, the character of the testimony given by them, the reasonableness of his own testimony, and its consistency with the established facts in the case, are all proper subjects for consideration by the jury in determining the credit to which his testimony is entitled.

VERDICT AS RECORDED is the verdict of the jury, and the form prepared in the jury-room, though handed to the clerk, is no part of the record, and has no significance whatever.

INDICTMENT for murder. On the trial it appeared that Noel Breyessee, *alias* Maison Noe, shot and killed Sophia Raes with a pistol on September 24, 1893. About ten o'clock in the evening of the day in question the accused, together with one Maison, *alias* Breyessee, left their home and went past the house of August Raes, husband of the deceased. Not finding him at home they concealed themselves and awaited his return. Thereafter Raes and his wife returned, when the accused and his companion attacked them with stones, knocking Raes down, and his wife ran to summon help. Upon her return the accused, at the instigation of his companion, shot twice with a pistol, killing the woman. The accused testified that Raes began the attack and was knocked down; that Mrs. Raes then ran away and soon returned with a neighbor, and that Raes then attacked the accused with a knife; that he then shot his pistol in the air to frighten Raes, and afterwards

shot a second time, the bullet passing over Raes' shoulder, killing his wife. The accused and his companion were jointly indicted, but, a severance being granted, the accused was put on trial first and convicted of murder in the first degree.

T. H. Davis and W. A. Blakeley, for the appellant.

C. Burleigh, district attorney, for the commonwealth.

455 WILLIAMS, J. This case appears to have been tried with great care in the court below. The distinctions between murder of the first and of the second degree were plainly pointed out, and the facts were submitted to the jury in a manner of which no just complaint can be made. The conviction of the defendant of the crime of murder of the first degree was the result of the overwhelming weight of the evidence against him.

The learned counsel for the defendant assigns error to the answers made by the learned judge to his first and second points. These points were answered in the affirmative, subject to a qualification, and it is of the qualification that complaint is made. These points drew the attention of the court to the testimony given by the defendant, and asked, in effect, that if, at the time the fatal shot was fired by the defendant, he believed himself to be in danger of death or great bodily harm at the hands of the assailant, and that "acting on that belief he fired 456 a revolver which killed the wife of the assailant, this would not be murder in the first degree, even though at the time the shot was fired the defendant intended to kill; and this though, in point of fact, there was no foundation for the apprehension of danger to the defendant." The learned judge affirmed this point so far as it was directed to the degree of the murder committed, but added: "If it is intended to state the law of self-defense, it lacks one of the essential elements that he had no other means of escape." We think the defendant had no reason to complain of his answer. It gave him the benefit of an unqualified affirmance of his point, so far as it related to the degree of the offense committed, and it stated correctly the law of self-defense. Life may be lawfully taken in self-defense; but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. It is the duty of one who is assailed to flee, if flight is possible; and it is only when he is

persuaded that he must suffer death or grievous bodily harm at the hands of his assailant, or take the life of his assailant, that he may save his own, that he can justify his act as done in self-defense.

The qualification of the answer to the third point was also a proper one. Where a deliberate purpose is formed to kill A, and the defendant fires a pistol at him for that purpose, the fact that the ball misses its intended victim and takes effect on B and kills him does not relieve the murderer. He is equally guilty whether his effort to kill A results in the taking of his life or the life of B.

The fifth assignment of error is equally untenable. The learned judge instructed the jury in the tests they should employ in determining the credibility of the defendant. He told them that the extent to which he was contradicted by the witnesses, the character of the testimony given by them, the reasonableness of his own testimony, and its consistency with the established facts in the case, were all proper subjects for consideration in determining the credit to which his testimony was entitled. This was a proper instruction to give, and was not harmful to the defendant, unless his testimony was of such a character that the application of these tests led the jury to reject it.

457 The remaining assignment relates to the overruling of the motion in arrest of judgment. The reasons in support of this motion rested on the following circumstance: When the jury came into court to render their verdict it was delivered and recorded in the usual manner, after which the jurors were discharged and directed to the office of the county commissioners to receive their pay. After they had left the box the clerk discovered a form for a verdict in pencil on the back of the indictment, in which the defendant was named "August Maison, otherwise called August Breyessee." The clerk called the attention of the judge to this indorsement, and he ordered the jurors recalled to the box, drew their attention to their verdict as already entered, and to the indorsement on the indictment, and told them if the name as written on the indictment was a mistake, and their verdict as recorded was correct, they might say so. The jurors thereupon answered that the verdict as recorded was correct. The defendant's counsel took exception to this action, and moved in arrest of judgment, alleging that the verdict was uncertain, as it was against one person in the pencil indorse-

ment, and against another as recorded. It is a sufficient answer to this motion to refer to the well-settled rule that the verdict as recorded is the verdict of the jury, and that the form prepared in the jury-room, though handed to the clerk, is no part of the record, and has no significance whatever: *Dornick* v. *Reichenback*, 10 Serg. & R. 84; *Rees* v. *Stille*, 38 Pa. St. 138; *Scott* v. *Scott*, 110 Pa. St. 387. It was wholly unnecessary to recall the jury. It was done out of abundant caution; but it did neither good nor harm. The verdict had been entered on the record in proper form against the defendant on trial, and the pencil memorandum was without the slightest legal significance. The reasons in support of the motion in arrest of judgment were properly overruled, and the judgment appealed from is now affirmed.

The record is remitted for purposes of execution.

HOMICIDE—SELF-DEFENSE.—To sustain the plea of self-defense in a case of homicide there must be shown a present pressing necessity, real or apparent, to protect the life of the defendant or his person from great bodily harm: *Brown* v. *State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note; *High* v. *State*, 26 Tex. App. 545; 8 Am. St. Rep. 488; *Springfield* v. *State*, 96 Ala. 81; 38 Am. St. Rep. 85; *Price* v. *People*, 131 Ill. 223; *People* v. *Donguli*, 92 Cal. 606; *People* v. *Macard*, 73 Mich. 15; *Shorter* v. *People*, 2 N. Y. 193; 51 Am. Dec. 286, and note; *State* v. *Chandler*, 5 La. Ann. 489; 52 Am. Dec. 599. In order to justify homicide on the ground of self-defense it must clearly appear that it was a necessary act in order to avoid destruction or some severe calamity: *State* v. *Wells*, 1 N. J. L. 424; 1 Am. Dec. 211. It is well settled that a man may not kill another in self-defense if he have other probable means of escape: *Commonwealth* v. *Ware*, 137 Pa. St. 465; *State* v. *Benham*, 23 Iowa, 154; 92 Am. Dec. 417, and note. See, also, the notes to the following cases: *Askew* v. *State*, 33 Am. St. Rep. 88; *State* v. *Shippey*, 88 Am. Dec. 75; *Grainger* v. *State*, 26 Am. Dec. 279; and *Patten* v. *People*, 100 Am. Dec. 181.

HOMICIDE—KILLING PERSON NOT INTENDED.—One who, in the attempt to kill one person, by mistake kills another is guilty of murder or manslaughter: *Butler* v. *People*, 125 Ill. 641; 8 Am. St. Rep. 423, and note. It is murder to shoot at a man with the alleged design of doing him an injury only, and killing a third person: *State* v. *Smith*, 2 Strob. 77; 47 Am. Dec. 589. Where one voluntarily fires a gun into a crowd with the felonious purpose of killing another, the unintentional killing even of a friend would be murder: *Golliher* v. *Commonwealth*, 2 Duvall, 163; 87 Am. Dec. 493. Where a party resisting arrest attempts to kill the officer while the latter is making an arrest, but by accident kills a third person, the killing is murder: *Angell* v. *State*, 36 Tex. 542; 14 Am. St. Rep. 880. One who kills another in attempting to commit suicide is guilty of murder: *State* v. *Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799; *Commonwealth* v. *Bowen*, 13 Mass. 356; 7 Am. Dec. 154; *Commonwealth* v. *Mink*, 123 Mass. 422; 25 Am. Rep. 109, and note.

VERDICT.—There is no legal verdict but a public verdict, delivered in open court, and until it is received and recorded the jurors may alter it: *Root* v. *Sherwood*, 6 Johns. 68; 5 Am. Dec. 191.

WETTENGEL *v.* GORMLEY.

[160 PENNSYLVANIA STATE, 559.]

WILLS—RIGHTS OF DEVISEES UNDER OIL AND GAS LEASE—ROYALTIES. When three contiguous tracts of land, subject to one oil and gas lease made by the owner in his lifetime, are devised by him respectively to his three children in equal parts, without mention of the lease, royalties accruing thereunder after his death should be divided among the three devisees in proportion to the acreage held by each, although the oil is produced from wells sunk on one of the tracts only.

OIL LEASE, because of the fugitive and wandering existence of the oil within the limits of the tract of land leased, partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying solid minerals.

ACTION to determine the ownership of royalties under an oil lease. Judgment of the court below to the effect that the royalties should be equally divided among the three devisees of James Gormley, deceased. James T. Gormley, one of such devisees, appealed.

J. McF. Carpenter, for the appellant.

J. S. Ferguson and E. G. Ferguson, for the appellee.

565 WILLIAMS, J. The question raised by this appeal is both novel and interesting. It is presented upon the following facts: James Gormley was, in his lifetime, the owner of three contiguous farms, containing together about six hundred acres. In July, 1888, he made an oil lease to Tomlinson covering all the land. It was to run for fifteen years, and reserved a royalty upon all the oil produced of one-eighth. The lease gave the lessee the usual privileges upon the land, among which was the right to take water from any part of it, and to any extent needed in his operations; a right of way into, and over, the body of land; a right to lay pipe lines to conduct the oil from the wells. It concluded with the following stipulation: "It is understood between the parties to this agreement that all conditions between 566 the parties hereunto shall extend to their heirs, executors, and assigns." The lessor died in October, 1890. By his last will and testament he gave one of these farms to each of his three children in fee, making no mention of the lease which included them all. The devisees have entered into possession of their respective farms, under the will of their father, and each holds in severalty. The holder of the oil lease has meantime put down several oil-wells and is producing oil therefrom; these wells

happen to be on the farm devised to James T. Gormley, the defendant, and he claims the entire royalty.

The question is thus seen to be, Who is entitled to the royalty reserved by the ancestor? Should it be divided between the three devisees in proportion to the acreage held by each, or should it be paid to James T. alone? The answer to this question must depend partly upon the character and legal effect of the lease, and partly on the nature of the product obtained under it. If the lease had been the ordinary agricultural lease, reserving a fixed annual rent payable in money, it would not be doubted that the fee descended to the devisees subject to the estate for years held by the tenant. The lessor could not change the rights of the lessee, or disturb his covenants, by a division of the land into parts and a devise of these parts to separate devisees. All the devisees together take the place of the devisor, and receive the rent due as an entire sum from the tenant. It would not matter that the grain was grown on one of the divisions, the grass upon another, while the third was unimproved and covered with forest; their interests would be several as to each other under the terms of the will, but as to the tenant they would be undivided under the terms of the lease made by their ancestor and covering the land at the time of his death. But this was not an agricultural lease, it was an agreement known as an oil lease; it conferred an exclusive right upon the tenant to take the oil that might underlie the whole six hundred acres, and gave him fifteen years within which to take it. It was in its legal effect a sale of the oil, for the removal of which the surface and the subsurface were subjected to the necessary servitudes.

The subsequent division of the body of land by the lessor could not divide or diminish the privileges of the lessee, or change his covenants. The lessee may locate his wells where [367] he pleases, regardless of the interests of the devisees of his lessor. He may distribute them over the six hundred acres, or locate them all on one of the divisions. He may crowd the lines of the adjoining divisions so as to enable him to draw the oil from them without drilling upon them, and in this manner deplete ultimately the whole territory by operations conducted on the farm of one of the devisees. It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from

five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying it is pierced by the drill the oil and gas find vent, and are forced by the pressure to which they are subject into and through the well to the surface. After this pressure is relieved by the outflow the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found, and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals. In the case of a coal lease, for example, the exact location, with reference to lines on the surface, of every pound of coal taken may be easily determined. The stratum of coal is as fixed and permanent in its character as are the strata of superincumbent rocks and earth. Its ownership as between several devisees, or heirs at law after partition made, is as easily determined as that of the surface. The removal of the coal from one purpart does not diminish or disturb that which underlies another. The lines that divide the surface divide, with absolute fairness to all concerned, the subsurface, and secure to the several owners, with certainty, the mineral that belongs to each. The rules applicable to coal leases, or leases of land containing any other solid mineral, are therefore [sic] not always capable of application to leases for the production of oil or gas, because of the difference between the solid and the fluid minerals, and because of the deficient conditions under which they are found and brought to the surface.

There is in this state no precedent that we are constrained to follow, and we cannot find that the question has been decided in any other of the oil-producing states.

We are in a position therefore to consider and determine it

For the reasons now briefly outlined, we con-

cur in the conclusion reached by the learned judge of the court below.

The judgment is affirmed.

The question involved in the foregoing opinion was, as the court declared, novel as well as interesting; and we believe it has not been elsewhere presented for consideration.

PHILADELPHIA *v.* MASONIC HOME.

[160 PENNSYLVANIA STATE, 572.]

CHARITIES.—A charity is a gift to promote the welfare of others.

CHARITIES—WHEN PUBLIC.—A charity may restrict its admissions to a class of humanity and yet be public in its nature, and so long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, the charity is public.

CHARITIES—WHEN NOT PUBLIC.—When the right to share in the benefits of a charity depends on the fact of voluntary association with some particular society, while all not members of such society are excluded, the charity is not purely public in its nature.

CHARITIES—TAXATION OF.—A home for the relief of aged and indigent Masons only, though supported by voluntary contributions, without charge to the beneficiaries and without profit to the institution or its officers, is not a "purely public charity," and is not exempt from taxation under a constitutional provision exempting "institutions of purely public charity" from all taxation.

ACTION to recover municipal taxes from the Masonic Home of Pennsylvania, a corporation. Judgment for defendant. Plaintiff appealed. Defendant's charter reads as follows:

"SECTION 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted, by the authority of the same, that Robert A. Lamberton, Christian F. Knapp, Henry B. McKean, Michael Nisbet, John A. Wright, D. W. C. Carroll, Jeremiah L. Hutchinson, Samuel B. Dick, James M. Porter, and James H. Hopkins, their associates and successors, be, and they are hereby, created a body corporate and politic, with perpetual succession, by the name and style of 'The Masonic Home of Pennsylvania,' and by that name are made capable in law and equity to sue and be sued, plead and be impleaded, contract and be contracted with, and to make, have, and use a common seal, and the same to break, alter, renew at pleasure, ordain by-laws, and

shall have the right to take and hold, by purchase, gift, or devise, real and personal estate, free from all taxation, for the purposes hereinafter named, and to sell, convey, or exchange the same at pleasure.

"SEC. 2. The object of said institution shall be to provide and sustain in the state of Pennsylvania one or more houses for destitute widows and orphans of deceased Freemasons of the state of Pennsylvania, and an infirmary or infirmaries for the reception and care of sick and afflicted Freemasons in indigent circumstances, and all such as may be placed under its charge by its managers.

"SEC. 3. The membership of said institution shall consist of life members, active members, and representatives of masonic bodies, under such regulations as the committee of management may prescribe, all of whom shall be Freemasons.

"SEC. 4. There shall be a meeting of the members of the institution called within three months after the passage of this act, for the purpose of electing members of the committee of management, prescribing its constitution, and general rules and regulations for the government of the institution."

The by-laws applicable to the question at issue were as follows:

"OBJECT OF THE HOME.

"SECTION 1. The Masonic Home shall have for its object, to provide and maintain a home for indigent, afflicted, or aged Freemasons, and for the destitute widows and orphans of Freemasons in the state of Pennsylvania, and for such others as may be placed under its charge.

"CORPORATION.

"SEC. 2. This corporation shall be composed of individuals as representatives of such masonic bodies as are recognized by the Grand Lodge of Free and Accepted Masons of Pennsylvania, and of such Master Masons as may become members thereof by complying with the by-laws.

"ADMISSION OF INMATES AND FEES.

"SEC. 41. Every nomination for admission into the home as an inmate shall be made in writing, at a stated meeting of the board of managers, setting forth the name, age (not less than fifty-five years), residence, social condition, and masonic membership of the nominee, with such other information as the board of managers may require.

"All nominations shall be recorded in a book kept for that purpose, in the order in which they are presented, and shall

be referred by the board of managers to the committee on admissions.

"SEC. 42. Inmates shall be admitted into the home after report of the committee on admissions; those under sixty years of age requiring a two-thirds, and others a majority, vote of the board of managers.

"SEC. 43. Each representative shall be entitled to make as many nominations for admission into the home as inmates as he may deem advisable, at the request of the masonic body represented by him; but not more than one nominee of a representative shall be admitted as an inmate while other nominees are upon the list from bodies which have at the time no inmate, and whose admission is approved by the board of managers.

"Individual members may also make nominations, subject to the same restrictions as to inmates as hereinbefore stated.

"In the event of an inmate withdrawing from the home, for any cause whatever, within three months after admission, so much of the fee paid into the funds of this corporation as shall remain after deducting five dollars ($5.00) per week for his board during his residence in the home, and, in addition, such other expenses as may be incurred in his behalf, shall be returned to the masonic body or individual member that paid the same.

"The preference for admission shall always be given in the following order, viz:

"1. To such nominees as are members of masonic bodies represented in the corporation, and nominated at their instance.

"2. To such nominees as may be placed in nomination by a representative of one masonic body, where the nominee is a member of some other masonic body which is also represented.

"3. To Master Masons nominated by individual members.

"4. To Master Masons belonging to masonic bodies located within the commonwealth of Pennsylvania, but not represented in this corporation, who may have been nominated as aforesaid.

"5. To Master Masons of other jurisdictions upon such nomination.

"SEC. 44. There shall be paid into the funds of this corporation, as the admission fee of an inmate, the sum hereinafter named, according to the age of the brother so admitted, as follows:

"If the applicant be 55 years of age, and not exceeding 60 years.....	$250 00
"If the applicant be 60 years of age, and not exceeding 65 years.....	200 00
"If the applicant be 65 years of age, and not exceeding 70 years.....	150 00
"If the applicant be over 70 years of age..	100 00

"SEC. 45. Any Master Mason wishing to secure a home for himself in his declining years shall, upon becoming a member of this corporation and the payment of four hundred ($400.00) dollars in addition to his membership fee, be at once nominated by a majority vote of the board of managers for admission into the home, in accordance with section 41 of these by-laws. He shall be exempt from the payment of annual dues, and, upon reaching the age of sixty (60) years or upwards, shall have precedence, according to date of nomination, of all other Master Masons nominated by either representatives or by individual members, subject, however, to the restrictions of section 43 of these by-laws; *provided*, that any member of this corporation, becoming an inmate of the home, shall thereby forfeit and terminate his membership in the corporation.

"PERMANENT FUND.

"SEC. 46. The permanent fund shall consist of the fees for life membership and admission of inmates, and of all donations and bequests, when not otherwise designated by the donor or legatee, and such other amounts as may be voted to the fund by the board of managers.

"All investments in the permanent fund shall be made under the supervision and direction of the committee on finance, who shall make a report of the investments in the fund annually, or whenever required, to the board of managers and the corporation.

"The interest from such investments shall be paid to the treasurer for the general uses of the corporation."

J. A. Alcorn, assistant city solicitor, C. F. Warwick, city solicitor, I. H. Shields, assistant city solicitor, for the appellant.

R. H. Hinckley, for the appellee.

877 DEAN, J. There is nothing of doubt in this case, except the question as to whether the appellee is an "institution of purely public charity," within the meaning of section 10, article 16, of the constitution of 1874. If it be not, nothing in

its charter or the statutes can avail to exempt it from liability to taxation.

The contention turns on the constitutional meaning of the words "purely public charity." "Words in a constitution that do not of themselves denote that they are used in a technical sense are to have their plain, proper, natural, and obvious meaning": *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 114. The legal definition of the word "charity" has been the subject of much discussion in the courts, especially in those of England, but its meaning here, discarding all technical sense, is, "a gift to promote the welfare of others." The appellee clearly is a charity. It provides for and maintains in the "Masonic Home" indigent, sick afflicted, and aged Freemasons. This too from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation or to its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs; such unselfishness excites the admiration and approval of all friends of humanity. General Wagner, president of the home testifies: "The number of inmates at present is thirty; their average age is seventy-two years; all are decrepit; if they could support themselves, they would not be admitted; the money to support them is contributed by different masonic lodges, individuals, Masons, men and women; the receipts are always less than the expenses, and a deficit has to be made up at the end of each year; no one is benefited except the inmates; they are fed, clothed, and lodged during life, and buried at death at the expense of the home." Of course, if this be not purely charity, nothing is.

But, is it a public charity? The word "public" relates to or affects the whole people of a nation or state. General Wagner further testifies: "The home is open only to those who are Masons; a man to be admitted must be a Mason." When the eligibility of those admitted is thus determined, it seems to us the institution is withdrawn from public and put in the class of private charities.

A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntary affects or may affect any of the whole people, although only a small

number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women, and children, not because they are Masons. A home, without charge, exclusively for Presbyterians, Episcopalians, Catholics, or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word "purely" is prefixed by the constitution; this is to intensify [579] the word "public" not "charity." It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity.

Nor does the argument that, to the extent it benefits Masons, it necessarily relieves the public burden, affect the question; there is no public burden for the relief of aged and indigent Masons; there is the public burden of caring for and relieving aged and indigent men, whether they be Masons or anti-Masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them. *Burd Orphan Asylum* v. *School District*, 90 Pa. St. 21, is cited as sustaining a different view. The test there, as to whether the defendant was a purely public charity, was whether there was any gain or profit to any class of persons or corporations who could assert a right to be beneficiaries. As there was not, and as the administrators of the charity could, in their discretion, select those who should be the recipients of the benefits, giving only a preference, the court held it to be a purely public charity. While concurring in the judgment in that case, because the facts showed it was administered as a purely public charity, I do not concur in the reason given for distinguishing a *quasi* public from a purely public charity. I would put the distinction on firmer as well as on what seems to me more clearly defined ground. Is any member of humanity, that greater public of whom the commonwealth is constructively the parent or trustee, excluded because he has not a particular relation to some society, church, or other organization, which relation is dependent on his wholly voluntary act? If so, if he be excluded in fact, because he is

not a Presbyterian, Freemason, or a member of some one of the innumerable religious, social, or beneficial organizations of the commonwealth, then, however pure may be the charity, however commendable its purpose, it is not "purely public," and its property must, under the constitution, be taxed; not because this court says so, but because the people have said so in their fundamental law.

Here, while the charter and by-laws of the institution do not see show that it is not "purely public," the undisputed facts, as to the administration of the charity, show that none were admitted except Freemasons, of course excluding all other aged and indigent men, because they had not chosen to become members of a particular society. This made admission depend on an artificial badge of distinction, and not on one incident to humanity, and therefore it is not "purely public." If this be purely public, then what is not purely public?

This is not a question to be decided on sentiment; if it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole; they have forbidden an annual appropriation of their money in a sum equal to the amount of taxes here imposed, for the benefit of a favored few; the duty of a court, when called upon to decide such a question, is so plain that he who runs may read.

As to the argument that the act of 1871 exempted the home from taxation, the act of 1874, when read in connection with the constitution of 1874, repealed all such exemptions enacted after the constitutional amendment of 1857. It is so decided in *Wagner Free Institute* v. *Philadelphia*, 132 Pa. St. 612, 19 Am. St. Rep. 613, and *Philadelphia* v. *Pennsylvania Hospital*, 134 Pa. St. 171.

The judgment is reversed at costs of appellee, and a new trial is awarded.

WILLIAMS, J., dissenting. This appeal depends on a definition. Its decision will affect many of the noblest charities in the state. The words requiring definition are the words "purely public," as used in section 1 of article 9 of the constitution of Pennsylvania. The paragraph in which the words occur is as follows: "But the general assembly may, by general laws, exempt from taxation public property used for

public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." A majority of this court holds that the defendant, the Masonic Home, is not an institution of purely public charity, and for that reason is subject to taxation like all other property held by private persons or organizations for private purposes. The [881] correctness of this decision depends on the result of two preliminary inquiries: 1. What is the meaning of the words "purely public" as used in the constitution? 2. What is the character of the Masonic Home and its work? In reply to the first of these questions it should be noticed that the legislature has undertaken an interpretation of the constitutional provision and of these particular words, by a law passed at the same session at which the adoption of the constitution was formally declared. The law was passed for the express purpose of giving effect to the constitutional provision authorizing the exemption of certain property from taxation, and to guide the taxing officers of the state in determining what property was entitled to the exemption authorized by the constitution. This purpose made it necessary to consider and determine the exact extent of the limits within which the exercise of legislative power was permissible under section 1 of article 9; and to define accurately each class of property to which the privilege of exemption was extended by it. Our present concern is with the fourth class, viz: "Institutions of purely public charity." The act of 1874 interpreted these words, and enumerated the institutions embraced by them, so as to include "all hospitals, universities, colleges, seminaries, academies, and institutions of learning, benevolence or charity founded, endowed, and maintained by public or private charity." This definition is broad enough to include the Masonic Home and all similar institutions of charity; and unless the constitutionality of the act can be successfully assailed the judgment of the court below must be affirmed.

It should be noticed in the next place that this court has adopted and followed the legislative definition in several cases in which the question was fairly raised and squarely decided. The first of these was *Burd Orphan Asylum* v. *School District*, 90 Pa. St. 21. The Burd Asylum was founded and endowed under the will of Mrs. Burd, "to establish an asylum for poor white female orphans." But not all poor

white female orphans were entitled to admission. They were required to be of legitimate birth, not less than four nor more than eight years of age, and baptized in the Protestant Episcopal Church; preference being given to such orphans in the city of Philadelphia; after them to such orphans in the state of Pennsylvania. [882] If both city and state failed to fill the asylum with those who met all the requirements, then poor white female orphans within the required age might be admitted without regard to the place of their birth or the fact of their baptism. This was not a public asylum in the sense of being open to the general public. It was a denominational institution, under denominational control, open in the first instance to children baptized in the churches of the denomination, and if enough such could be found, then to no one else.

We held that such an institution was a charity. As it was administered in the interest of the helpless in the city and the state, it was a public charity; as there was no element of private or corporate gain in its organization or management, it was a purely—that is wholly—public charity. It was within the letter of the act of 1874, and within the spirit and intention of the constitutional provision.

In *Fire Insurance Patrol* v. *Boyd*, 120 Pa. St. 624, 6 Am. St. Rep. 745, we held that an organization whose purpose was to save life and property endangered by fires, without charge to the persons or to the owners of the property rescued by the efforts of the members and employees of the organization, was a charity. It was supported by contributions made by insurance companies and others, and rendered its services gratuitously whenever and wherever a fire occurred in the city. It was therefore a public charity; and as there was no profit or gain to its projectors or managers contemplated, and no return received from those benefited by its labors, it was wholly—that is purely—a public charity. The same doctrine was held in *Philadelphia* v. *Women's Christian Assn.*, 125 Pa. St. 581; in *Northampton Co.* v. *La Fayette College*, 128 Pa. St. 132, and *Episcopal Academy* v. *Philadelphia*, 150 Pa. St. 565. In each of these cases the act of 1874 was treated as a correct exposition of the constitutional provision. Other questions were raised and considered, but in no one of these cases has this court given expression to the slightest doubt about the constitutionality of the act of 1874, or attempted to give any other definition of the words "purely

public charity" than that given by the legislature in that act. The same definition may be found in substance in *Donohugh* v. *Library Company*, 86 Pa. St. 306, in which we said that a purely public charity "is not necessarily one [sic] solely controlled and administered by the state, but the phrase extends to and includes private institutions for purposes of purely public charity, and not administered for private gain." We defined the word "purely" in the same manner in that case as in the later cases above referred to as meaning completely, entirely. The institution must not be administered for private gain, but completely, entirely, purely, in the interest of the charity. Upon this distinction the property of the Delaware County Institute was held liable to taxation: *Delaware County Inst.* v. *Delaware County*, 94 Pa. St. 163. The advantages of that institute were confined to its members, and it was for that reason a private charity, if it could be regarded as a charity at all. The benefits came back to the members, who were necessarily the contributors, and no one else shared in them. It was not intended to serve the public, or to relieve in the slightest degree the public burdens, but to minister to the tastes and the intellectual improvement of those whose money purchased the books and provided for their care.

A provision for one's self, or for those for whom he is legally bound to provide, is private and personal in its object. It has no public purpose or work. So a hospital or school designed to secure to a town or a region better medical attention or better education than would otherwise be within the reach of such town or region may be a charity in an important sense; but if it is conducted with a view to private or corporate gain, it is a private charity. If it is conducted and maintained by the gifts of individuals, or the public, for the benefit of its inmates, it is a public charity; and, being free from the element of private or corporate gain, it is a purely public charity, within the meaning and the letter of the act of 1874, and is protected from taxation by the list of decided cases already cited.

But let us suppose that the legislative definition of a purely public charity had not been made; and the decisions cited had not been rendered; and the question was now to be considered as one of first impression, how in such case ought it to be determined?

The subject before the framers of the constitution was taxation. They declared this should be uniform, and levied

under general laws, but some property ought not to bear taxation, and so exemption from the public burden came to be considered. This also must be regulated by general law, and not left [884] to the caprice, or favoritism, or prejudice of the lawmakers. Where may the legislature draw the line that shall separate the taxable from the nontaxable property of the state? This question was answered by the adoption of the well-understood distinction between public and private uses. The words employed were "public property used for public purposes," that is property the title to which is in the public, and which is actually used for some public purpose; "actual places of religious worship," no matter who may own them or worship in them, for the support of public worship tends to the public improvement; "places of burial not used or held for private or corporate profit," for the gift of land to the public for purposes of burial is a gift to a public use; and finally, "institutions of purely public charity," or, in other words, institutions that are already ministering to the public, and so ought not to pay taxes because public in the ends they serve, and without any element of private gain in their organization or management. This is the plain, obvious meaning of the consecutive sentences devoted to the subject of exemption from taxation.

Moreover, the reason for any exemption should be considered. Why ought any property to be exempt? Taxes are levied and collected to provide the public purse with money for the support of public institutions conducted by it, and to defray public expenses in the preservation of order, the administration of justice, and the support of public schools. A woman like Mrs. Burd, or a man like Stephen Girard or Isaiah Williamson, devotes a large fortune to the founding and endowment of an institution intended to relieve the public burden, and advance the public good, by taking up some part of its work and doing it with more thoroughness and fidelity than the public could do it through its officers. The property of such an institution is not simply contributing, like taxable property in general, to the public good, but is devoted absolutely and irrevocably to it. The title may remain in trustees, but it is in effect dedicated wholly to public uses, with no element of private gain whatever. To levy taxes on property so given to a charitable use is unjust toward the benevolent giver, and is coldly cruel to the beneficiaries. This will be conceded as to the Burd Orphan Asylum and

Girard College. To deny it would be to shock the public sense of justice. A majority of this court, however, [sss] deny exemption to the Masonic Home; and the reasoning on which that denial rests would logically lead to a denial of it to all social, denominational, or trade organizations providing for the education, support, medical treatment, and burial of their members, their widows, and orphans. What is the Masonic Home? It is a corporation, whose object is set out in its charter, its constitution, and its by-laws.

In the constitution, it is stated thus: "The object of said institution shall be to provide and sustain in the state of Pennsylvania one or more houses for destitute widows and orphans of deceased Freemasons of the state, and an infirmary or infirmaries for the reception and care of sick and afflicted Freemasons in indigent circumstances, and all such as may be placed under its charge by its managers."

In the by-laws it is stated in these words: "The Masonic Home shall have for its object to provide and maintain a home for indigent, afflicted, or aged Freemasons, and for the destitute widows and orphans of Freemasons in the state of Pennsylvania, and for such others as may be placed under its charge."

It is conceded by my brethren that this is a charitable object, and that the home is a charity. The point taken is that it is a private, and not a public, charity. It was founded and endowed, as the evidence clearly shows, and it is maintained, by voluntary gifts. Out of the contributions made to it the grounds and buildings have been paid for, and the maintenance of its inmates provided. It is supporting, nursing, and caring for thirty or more aged men who would otherwise be dependent upon the almshouse, or other forms of charity supported by taxation. No profit is possible to any person, corporation, or society. The entire plant, and the stream of voluntary gifts on which it is dependent, are devoted wholly to the charitable work described in the constitution and by-laws of the home. The contributors get nothing for their money but the approval of their consciences, and the knowledge that they are increasing the happiness of the aged, indigent, and afflicted.

I see nothing private about such a charity. It is not limited in its work to the donors or their children. It brings no pecuniary benefit or return. It is done in relief of public taxation, and in the interest of humanity, and that brotherly

love that becomes the children of a common father. Preference is *sic* given to members of the masonic fraternity, their widows and orphans, but it is also open to all persons, regardless of their relation to the masonic body, who may apply for admission and be found by the managers to be suitable persons "to be placed under its charge." Its doors are as wide as those of the Episcopal Academy, or the Burd Orphan Asylum, or the Girard College. The requisites to admission are fewer and simpler. They are, first, masonic connection and helplessness; next, helplessness and suitability for admission to an institution conducted in the manner adopted by the managers for the home. The qualifications in both instances are to be judged of by the managers. So in any almshouse or hospital or asylum the fitness of the applicant for admission must be determined by the proper officer before the doors will open to him or her.

But it will perhaps be said that the purpose that moved the contributors was to provide for masonic brethren and their families, and that this ought to subject their gifts and their noble charity to taxation. Then every denominational hospital, school, or asylum should be taxed for the same reason. All contribute alike to the public good; all alike relieve the public burden and the taxpaying property of the commonwealth; but all give, to some extent, preference to a particular class of the public, and then open their doors to those outside the class who are within the general purpose of the charity. The Women's Christian Association has for its beneficiaries young unmarried women. The Snug Harbor for Seamen provides for sailors. The Bricklayers' Union for a limited subdivision of housebuilders. The homes for mechanics, apprentices, newsboys, sewing-women, actors, disabled clergymen, and the like, all limit admission to the class of persons described in the names they have adopted. Indeed in all charitable institutions, whether founded and maintained by private beneficence or by public taxes, some principle of selection prevails. The county poorhouse is for the care of those whose legal settlement is within certain geographical lines, and the wretch who cannot show his title to admission, on the map, must starve on the outside. A member of the great public may, like Lazarus, subsist on crumbs or die for want of them at the gateway of a "public charity," if he belongs to another "poor district." Such a thing as a charitable institution that is

open absolutely to the general public without limitation or [587] restriction is not to be found in our state or country. Sailors and soldiers are cared for by the public in separate homes and separate hospitals. The state cares for injured miners in hospitals devoted to them exclusively. The deaf are in one institution, the dumb in another, the blind in a third. Hospitals are provided for consumptives, for persons afflicted with contagious or infectious diseases, for invalids whose diseases are of a nervous origin, and so on. The feeble-minded are gathered in one place, those crippled or deformed in body in another. The foundling has institutions to which it is admitted and from which others are excluded. Homes for aged persons, for aged couples, for fallen women, are open only to those for whom the charity was founded. Then, too, there are homes for widows, to admission to which a previous marriage and the death of a lawful husband are the necessary requisites; schools for soldiers' orphans, from which all other children are excluded; homes for decayed merchants, for superannuated and disabled clergymen, for disabled and aged firemen, and a long list of similar charities founded for a class of beneficiaries selected by reference to their trade, occupation, social position, denominational affiliation, age, color, disease, or place of residence. These are all engaged in ministering to the public needs; they all do some part of the work, and bear some part of the burden that would otherwise fall upon the public. They are all public charities, and, when free from any private or corporate gain, are purely public charities. The institution now made subject to taxation by the decision just rendered is one of the many charities doing the work of the public without the aid of public money, and doing it more tenderly and more thoroughly than it could be done in charitable institutions supported by taxation. Such institutions not only provide food and clothing and necessary medical attention to their inmates, but they go further—they seek to assuage the sorrows and cheer the last days of those to whom they minister, and surround them with the comforts of a well-appointed home. For this added liberality and care they are declared to be private charities, and compelled to take part of the gifts of the benevolent from those they were intended to benefit, and use it to pay taxes upon property actually dedicated to the public use. The position of the city of Philadelphia in levying taxes upon such charities is ungracious. [588] It says, in effect, to them:

"It is true your property represents the unselfish gifts of the benevolent; it is true that it is devoted to the relief of suffering and the care of persons who must otherwise be chargeable to us. It is true that your work is for the public good and in relief of taxpayers, but you must do what we do not; you must ask no questions and take all who come. If you do not, then charity is a luxury which we shall tax you for. You must convert your home into a mere public almshouse, or else pay roundly for the privilege of carrying part of the public burden." The judgment of this court seems to be that the position of the city is correct, and that, notwithstanding the fact that a man or a society devotes a fortune to the care of the helpless and the relief of the taxpayers, the property occupied for the purposes of the charity so founded and maintained must be treated as a business investment and compelled to pay taxes, though the money used for that purpose is taken out of the mouths and off the bodies of the inmates. I dissent from the judgment and from the reasons on which it is rested. In my opinion, nothing marks the advancement of the age in which we live so much as the growth of organized charity in the increased care for the unfortunate and the helpless. This growth shows itself in the character of the hospitals, reformatories, and asylums supported by the public funds. It is seen in a still more striking manner in the number and variety of richly endowed charitable institutions that owe their existence and their power for good to the munificence of individuals. So long as sickness and poverty and misfortune are in the world, so long this field for private generosity will offer room for the labors and the fortunes of the benevolent. The better the field is occupied the better it will be for the public at large and for the individuals who help to make up the indefinite body we call the public.

Now and then some piece of property used for charitable purposes may cease to pay taxes, but for every dollar so withheld from the public treasury many dollars will be saved to it by the relief of the public burdens by means of the charity so established. But if we lift our eyes from the tax list and consider the work done by these charities, of which there are several hundreds in this city alone, we shall see that the public gain from their labors and expenditures is incalculable. There is probably no city on either side of the ocean so justly celebrated for the multitude of its charitable institutions as

Philadelphia. A distinguished citizen, who is himself actively identified with several of them, places the total number at about six hundred. Some of these are supported by public funds, but most of them are monuments to the enlightened liberality of private citizens, who have given their money with a freedom and discrimination that are without any parallel, at least in this country. It would be difficult to name a form of suffering that has not been provided for by some generous man or woman, whose attention has, in some manner, been drawn to that particular field for charity. The sums thus dedicated to the public service make an enormous aggregate, and the institutions supported by them embellish the city, and honor it. The Masonic Home is one of these. It now enjoys the undesirable distinction of being the first admitted charity which has no trace of private or corporate gain about its organization or management, to be condemned by this court to the payment of taxes as the price of being allowed to go on with its unselfish work of charity. It carries part of the public burden. It lifts what it carries off the shoulders of the taxpayers. It does this with a stream of generous contributions from the pockets of private citizens; but it is now judicially determined that it must take the money contributed for the care of the sick, the infirm, the aged, the afflicted, and use a part of it to pay taxes on the buildings and grounds in which its work is carried on, and in which the homeless and helpless are sheltered and fed.

I dissent wholly from the proposition that such charities are private. They are purely public. They are within the act of 1874, as is admitted. They are within our own cases beyond any doubt. They are within the intent and meaning of the constitution, and are in my opinion clearly entitled to exemption from taxation. I would affirm the judgment of the court below.

Mr. Justice GREEN: I concur in the foregoing opinion.

CHARITIES—WHEN PUBLIC.—The true test of a legal public charity is the object sought to be attained, the purpose to which the gift is to be applied, and not the motive of the donor: *Fire Ins. Patrol* v. *Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745, and note. The following cases give instances of valid public charities: *American Asylum* v. *Phœnix Bank*, 4 Conn. 172; 10 Am. Dec. 112; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Hennepin County* v. *Brotherhood of Gethsemane*, 27 Minn. 460; 38 Am. Rep. 298, and extended note; *Coit* v. *Comstock*, 51 Conn. 352; 50 Am. Rep. 29, and note; *Sears* v. *Chapman*, 158 Mass. 400; 35 Am.

St. Rep. 502, and *Coe* v. *Washington Mills*, 149 Mass. 543. See, also, the notes to the following cases: *Howe* v. *Wilson*, 60 Am. Rep. 230; *Rhymer's Appeal*, 39 Am. Rep. 738, and *Manners* v. *Philadelphia Library Co.*, 39 Am. Rep. 748; but a masonic lodge is not a public charitable or benevolent institution: *Bangor* v. *Masonic Lodge*, 73 Me. 428; 40 Am. Rep. 369, and note.

CHARITIES.—WHAT EXEMPT FROM TAXATION AS PUBLIC: See the extended note to *Hennepin County* v. *Brotherhood of Gethsemane*, 38 Am. Rep. 300-303.

JOHNSON *v.* READING CITY PASSENGER RAILWAY.

[130 PENNSYLVANIA STATE, 647.]

STREET RAILWAYS—NEGLIGENCE.—DUTY OF DRIVER OF STREET-CAR is to drive with care, to be on the lookout for obstructions, whether persons or vehicles, on the track, but he may, in the performance of his duty, ascertain from a person on the side of the street, by looking at him, whether he desires to take passage, and in doing so it does not necessarily follow that he is guilty of negligence.

STREET RAILWAYS—NEGLIGENCE—WHEN QUESTION FOR JURY.—When, in an action to recover for injuries to a child run over by a street-car, the evidence is conflicting as to the length of time the child was on the track, and whether the driver of the car could have seen it, had he been looking at the track, in time to stop before reaching the child, the question of negligence is for the jury to determine.

NEGLIGENCE—DUTY OF PARENT TO PROTECT CHILD.—It is the duty of a parent to shield his young child from danger, and if, by his own carelessness and neglect of the duty of protection, he contributes to his loss of his child's services, he is *in pari delicto* with a negligent defendant, and cannot recover for an injury to the child. Whether the parent is negligent depends on whether, under the circumstances, he takes reasonable care of his child.

STREET RAILWAYS—NEGLIGENCE TOWARD CHILD.—The mere fact that a young child is on a railroad track, where it has no right to be, does not relieve a street railway company from liability for its own negligence in injuring the child.

NEGLIGENCE—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT. A mother who performs her own household duties, and cares for her child twenty months old, but who has no paramount duty to perform which could excuse inattention to the child at the time when she permits it to come out of an open door in which she is standing, pass at her feet out to a street railway, without her knowledge, and there, in full view, place itself on the track, with an approaching car also in full view, is guilty of such contributory negligence that no recovery can be had by the parents for the loss of the child, if it is run over and killed by the passing car.

C. H. Schaeffer, H. A. Muhlenberg, and R. L. Jones, for the appellant.

C. H. Ruhl and D. Ermentrout, for the appellee.

649 DEAN, J. The defendant's horse-car railway is on Eleventh street in the city of Reading. James E. Johnson was a young married man living with his wife, Annie Johnson, in dwelling No. 222, fronting on the street where the railway was operated. He was a freight-handler, receiving moderate wages, and his wife did her own work. They had one child, James E. Johnson, a boy twenty months old. About eleven o'clock of the forenoon of May 7, 1891, th s child was run over by defendant's car in front of its pare t ' house, and killed. The parents, averring that its death was caused by the negligence of the defendant, brought suit, and, on trial in the court below, got a verdict and judgment in damages, and from that judgment comes this appeal 650 by defendant. The assignments of error in substance are two: 1. There was no evidence of negligence on part of the company; 2. There was undisputed evidence of negligence on part of the mother of the child, one of these plaintiffs. If the averment in either assignment be true, the appeal must be sustained, otherwise not.

At the time of the accident the car was going at the rate of four or five miles an hour; certainly not a dangerous speed; the child was sitting on the track; it was first seen by a passenger in the car, who warned the driver, when an ineffectual attempt to stop the car was made. The distance of the child from the horses when first seen by the passenger was from three to six feet. Apparently, just at the moment the child was noticed on the track, the driver's face was turned towards the side of the street, his attention being diverted in that direction by the movement of some persons he thought wanted to get on the car. When he saw the child, he put on the brake and did all he could to stop the car, but it was too late. The plaintiff alleged it was the duty of the driver to constantly keep his eyes on the track in front of his horses; instead of so doing, he turned to watch the movement of persons on the side of the street who desired to take passage, and, from this neglect of duty on his part, he failed to see the child in time to stop the car. We decline to say, as urged by appellee, that a street-car driver may not, under any circumstances, turn his head to observe the movements or signals of those who desire to get on the car. His duty is to drive the horses with care; to be on the lookout for obstructions, whether persons or vehicles, on the track; he may, in the performance of this duty, ascertain from a person on the side of the street,

by looking at him, whether he desires to take passage; in doing this, he may for an instant turn his face to the sidewalk. It does not necessarily follow from this he was guilty of negligence. But how long this child had been on the track, and at what distance the driver might have seen it had his attention been directed to the track, does not clearly appear; the evidence is somewhat conflicting on this point. When the passenger first saw the danger it was impossible to stop soon enough to avoid it; but the child was on the track when he saw it; whether the driver could have seen it had he been looking at the track in time to stop before [651] reaching it, was a question, it seems to us, for the jury. If, without doubt, it had appeared that the same moment the driver turned his face to the sidewalk the child got on the track there would have been nothing to warrant an inference of negligence on part of defendant, because then it was only three to six feet from the horses.

But appellant alleges, even if there was any evidence of negligence on part of defendant, there was manifest negligence on part of the mother, one of these plaintiffs, which contributed to the accident, and therefore there can be no recovery.

As we have stated, the father of this child was in moderate circumstances; the mother cared for her own child and attended to her household duties; she did not permit it to run on the street. We held in *Smith* v. *Hestonville etc. Ry. Co.*, 92 Pa. St. 454, that the parent owes to the child protection. It is his duty to shield the child from danger, and his duty is the greater the more helpless and indiscreet the child is. If, by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant, and cannot recover. Whether the parent was negligent depended on whether, according to the circumstances, he took reasonable care of his child. Also, from *Rauch* v. *Lloyd*, 31 Pa. St. 358, 72 Am. Dec. 747, through a long line of cases, this court has uniformly held that the mere fact of the incapacity of the child neither creates nor shields from liability; if there be no negligence on part of defendant, the injury of the child is its misfortune; if there be negligence on part of defendant, and no negligence on part of parent, the want of discretion in the child is no protection to defendant. We assume, then: 1. That defendant here was negligent; 2. That the fact that a child of this age was on the track, where it

ought not to have been and had no right to be, of itself, in no degree excuses defendant. But then comes the next question, Was it there because of the carelessness of the mother? The facts as stated by her are these: Immediately before the accident her two sisters-in-law, Mrs. Rightmeyer and Mrs. Johnson, with their three children, called and remained about half an hour; when they left, Mrs. Johnson went with them to the door, and stood talking with them about five minutes on the porch immediately outside; she had left her own child in the kitchen; [852] while standing at her own door, talking to her departing visitors, the child came from the kitchen, through the house, passed its mother at the door, crossed the intervening sidewalk and street, a distance of about twenty-eight feet, to the farthest track of the railway, where, in immediate view of the mother, it was killed. She did not even know it was her child until after the accident. A child twenty months old, an open door, a dangerous railway track within a few feet of the open door; the mother standing in full view of the door and the track, and the further fact that it would probably take the little child as long to toddle from the door to the track before the eyes of its mother as it took the approaching street-car to come a square. Was this such care as was due from the mother to her child, according to the circumstances? It would be a harsh rule to hold that this mother, in her pecuniary circumstances, was bound to give her undivided attention to her child to the neglect of all other wifely duties, and there is no such rule of law in Pennsylvania, as we have held in very many cases. If the child had escaped from the house while the mother's attention was given to some other of the many cares which burden the woman who keeps her own house, the case would have come within the rulings in *Kay* v. *Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Smith* v. *Hestonville etc. Ry. Co.*, 92 Pa. St. 454, and like cases. But here, when there was nothing whatever to prevent watchfulness, this mother permitted this child to come out of the open door, pass at her feet out to a railway, and there in full view place itself on the track, with an approaching car also in full view. Was this care according to the circumstances, or was it negligence?

The answer must be, and there is no escape from it, that it was negligence, and negligence which contributed to the accident. If these parents had been in different circumstances, and had had in their service a nurse whose special duty it was

to watch the child, and who, while talking to companions at the door, had permitted it unobserved to go out on this railway track where it was run over, the servant would have been immediately discharged by the parents, and justly too, because of gross negligence. But where is the distinction in duty between that of the servant and the mother in that particular five minutes in which occurred the circumstances resulting in this accident? The mother, at that time, had no paramount or exacting [653] duty to perform which could excuse inattention to her child; her first duty under the circumstances at that particular time was to guard it; she was in the most favorable situation to perform the duty; the child before her, the danger in full view; and this, not for an instant, but during the time it took the child to make its way from the door, over its mother's feet, over the pavement, into the gutter, out to the rails.

In so far as this opinion reflects on the conduct of plaintiff, we regret that what we have said seemed necessary in vindication of the judgment; without the criticism of others, her regret must be lifelong as well as unavailing, and as far as possible we have refrained from adding any thing to her burden.

The evidence of contributory negligence is so clear and indisputable that the judgment cannot stand. Appellant's seventh assignment of error is sustained, and the judgment is reversed.

Mr. Chief Justice STERRETT and Mr. Justice MCCOLLUM dissented.

STREET RAILWAYS—DUTY OF DRIVERS TO LOOK OUT.—It is not sufficient care on the part of a gripman on a cable-car, on approaching a curve, to ring the bell and then go ahead, neither looking to the right nor the left: *Winters* v. *Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591. Where a city ordinance makes it the duty of street-car drivers to keep a lookout for all persons approaching the track, and to stop the car on the first appearance of danger, a failure to perform this duty is negligence: *Hays* v. *Gainesville etc. Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624. It is the duty of a street-car driver to exercise a reasonable degree of care and diligence in watching the street ahead of him, so as to prevent collisions and avoid injury to pedestrians lawfully traveling thereon whether adults or children: *Anderson* v. *Minneapolis etc. Ry. Co.*, 42 Minn. 490; 18 Am. St. Rep. 525, and note. It is the duty of a gripman to keep his eyes on the track before him: *Schnur* v. *Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680, and note, with the cases collected.

STREET RAILWAYS — NEGLIGENCE IN RUNNING OVER CHILD. — WHEN QUESTION FOR JURY: See *Rosenkrans* v. *Lindell Ry. Co.*, 108 Mo. 9; 32

Am. St. Rep. 583, and note; *Schaur* v. *Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680, and note.

NEGLIGENCE TOWARD CHILD.—Where a young child is negligently allowed by a parent to go into a public street, yet does no act which prudence would forbid, it may recover for injuries sustained by it through the negligence of another: *Wissell* v. *Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451 and note.

NEGLIGENCE TOWARD CHILD.—CONTRIBUTORY NEGLIGENCE OF PARENT: See *Grant* v. *Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 449, and note, with the cases collected; also the note to *Western Union Tel. Co.* v. *Hoffman*, 26 Am. St. Rep. 762, and the extended note to *Westbrook* v. *Mobile etc. R. R. Co.*, 14 Am. St. Rep. 560.

CASES

IN THE

COURT OF CRIMINAL APPEALS

OF

TEXAS.

Cook v. State.

[32 Texas Criminal Reports, 27.]

Evidence—Confessions—Admissibility.—A confession made by a person not under arrest nor in confinement, to be admissible, must be voluntary, not obtained by improper influences, nor by threats or promises of such character as may have influenced the person making the confession.

Evidence.—A Confession Made by an Accused Who is Misled by an untrue statement that he had been seen to take goods, and would be prosecuted if he did not settle at once, and who settles at a price below a felony theft to stop prosecution, is not voluntary, and is not admissible in evidence on a subsequent prosecution against him for felony in taking such goods.

Evidence.—Confessions Obtained by False Statements of the prosecutor or by fraud are not voluntary, and are not admissible in evidence.

Baker and Sumners, Pleasants and Bailey, and Price and Green, for the appellant.

R. L. Henry, assistant attorney general for the state.

[28] Simkins, J. Appellant was convicted of the theft of property of the value of twenty dollars, and sentenced to two years in the penitentiary, from which he appeals.

Appellant complains that the court erred in permitting his confession to go to the jury, because not freely or voluntarily made. The bill of exceptions shows that Thrift, the merchant whose goods were stolen, sent word to defendant that he had better come down and settle; that his (Thrift's) wife and a boy in the store had seen defendant in the store taking the goods, and it would be better for him to come in and tell what he got, and pay for them, and unless he did it he

(Thrift) would certainly prosecute him. On the following night appellant came to Thrift's store and confessed he had taken the goods to the value of eighteen dollars, which he enumerated, and compromised with Thrift for seventeen dollars. He denied getting any other goods than those enumerated. As a matter of fact the message sent by Thrift to appellant, about his being seen taking the goods, was untrue, and, outside of the statement of appellant, Thrift was unable to identify the kind or value of the property stolen, except a few articles of clothing he recognized upon appellant before he sent him the message [39] "to come and settle," which articles were not included in the list enumerated by appellant. As this confession was not made under arrest, nor in confinement, the common-law rule controls, to wit, to be admissible, the confession must be voluntary, not obtained by improper influences, nor by threats or promises of such a character as may have influenced the person making the confession: Wilson's Criminal Annotated Statutes, sec. 2469; 1 Greenleaf on Evidence, 219; *Clayton* v. *State*, 31 Tex. Cr. Rep. 489.

The confession was by no means voluntary. Misled by the statement, which was untrue, that he had been seen to take the goods, and would be prosecuted if he did n't settle at once, appellant became extremely anxious to stop the prosecution, or only be prosecuted for a misdemeanor, and settled at a price below a felony theft. This confession was not voluntary, and should have been excluded. We concede that the cases excluding confessions on the ground of unlawful inducement have gone too far in the protection of crime (*Regina* v. *Reeve*, 12 Cox C. C. 179), and that too frequently justice and common sense have been sacrificed on the shrine of mercy in the rulings of courts, and that judges, of late years, are reaching this conclusion: Taylor on Evidence, 807. Still, where it appears that a confession like the one at bar was obtained by false statements of the prosecutor, or by fraud, it ought to be excluded. For the error of the court in admitting the confession, the judgment is reversed and the cause remanded.

Judges all present and concurring.

EVIDENCE—CONFESSIONS, WHEN ADMISSIBLE.—Confessions of one accused of crime are admissible in evidence only when it is clearly shown that they were freely and voluntarily made: *Lauderdale* v. *State*, 31 Tex. Cr. Rep. 46;

37 Am. St. Rep. 788, and note with the cases collected. To the same effect, see *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145, and note. This question is thoroughly discussed in the extended notes to *Daniels* v. *State*, 6 Am. St. Rep. 242; *Nolan* v. *State*, 46 Am. Rep. 253, and *Heldt* v. *State*, 57 Am. Rep. 839.

BREWER *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 74.]

FORGERY OF NAME OF DEAD PERSON.—The signing of the name of a dead person to an instrument with intent to defraud is forgery.

FORGERY OF NAME OF UNAUTHORIZED OR FICTITIOUS PERSON.—One who, with intent to defraud, makes a false instrument, and signs the name of a fictitious person thereto, or of one having no legal capacity to make the paper, is guilty of forgery.

FORGERY—APPELLATE PRACTICE.—An objection taken in the lower court to the admission in evidence of a check upon which a charge of forgery is based, because it is fatally variant from that alleged in the indictment, cannot be considered on appeal, although the check is incorporated in the record, if it is not certified by the clerk, nor in any way identified as the original check.

EVIDENCE—DECLARATIONS OF ACCUSED BEFORE ARREST.—Statements made to arresting officers before an arrest by a person accused of crime are admissible in evidence against him.

C. J. Davis and Walter E. Latimer, for the appellant.

R. L. Henry, assistant attorney general, for the state.

DAVIDSON, J. Omitting preceding portions, the indictment charges that "Henry Brewer did then and there unlawfully and without lawful authority, and with intent to defraud, did willfully and fraudulently make a false instrument in writing purporting to be the act of another, to wit, the act of C. F. Hathaway, which said false and forged instrument is to the tenor following:

"'PARIS, TEXAS, January 13, 1892.

"'Number 2. The City National Bank: Pay to *Hury* [meaning Henry] Brewer, or bearer, 35 dollars.

"'C. F. HALHAWAY [meaning Hathaway].'"

1. It is contended, inasmuch as Hathaway was dead at the time his name was signed to the check, that therefore the making of the false instrument cannot constitute the crime of forgery. The authorities do not sustain this position. On the other hand, so far as we have been able to ascertain, the contrary doctrine has been held to be the correct one, and adhered to wherever the question has been adjudicated:

Henderson v. *State*, 14 Tex. 503; *Billings* v. *State*, 107 Ind. 54; 57 Am. Rep. 77; 2 Bishop's Criminal Law, sec. 543, and notes.

It has also been held that he who signs the name of a person who had, or has, no legal capacity to make the instrument, is guilty of forgery: *People* v. *Krummer*, 4 Park. Cr. 217. And so, where the accused makes the false instrument by signing the name of a fictitious person thereto, he is guilty of forgery: 1 Bishop's Criminal Law, sec. 572, and note 6; 2 Bishop's Criminal Law, sec. 543, and note 5.

2. The check offered in evidence was objected to because fatally variant from that alleged in the indictment. This objection seems to be based [78] upon bad handwriting, if we look to the original check. We are not authorized to do this, because it is not certified by the clerk, nor in any way identified as such original check (*Carroll* v. *State*, 24 Tex. Cr. App. 313), but, if considered, we fail to see the supposed variance.

3. Defendant was not under arrest at the time he made the statements to the officers; therefore his objection on this ground was not well taken. The judgment is affirmed.

Judges all present and concurring.

FORGERY—SIGNING FICTITIOUS NAME.—Signing the name of a fictitious person with an intent to defraud is forgery: *State* v. *Warren*, 109 Mo. 430; 32 Am. St. Rep. 681, and note; *State* v. *Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119; *Lascelles* v. *State*, 90 Ga. 347; 35 Am. St. Rep. 216. See, also, the extended note to *Arnold* v. *Cost*, 22 Am. Dec. 308.

EVIDENCE.—CONFESSIONS OF PERSONS NOT UNDER ARREST: See *Cook* v. *State*, 32 Tex. Cr. Rep. 27, *ante*, p. 758, and note.

STEGALL *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 160.]

LARCENY—KILLING ANIMAL TO CONCEAL PREVIOUS THEFT.—The taking and destruction of an animal from an innocent purchaser, by the party who originally stole and sold it, the second taking being to conceal the first theft, constitutes larceny.

LARCENY—DESTRUCTION OF PROPERTY STOLEN TO CONCEAL THEFT.—To constitute the felonious taking in larceny it is not necessary that the taking should be done *lucri causa;* a taking with intention to destroy the property to conceal the evidence of a previous theft thereof, if done for the benefit of the offender or another person, is sufficient to constitute larceny though no pecuniary benefit arises therefrom.

INDICTMENT for the theft of cattle alleged to have been the property of one Kokernot.

Glass and Burgess, for the appellant.

R. L. Henry, assistant attorney general, for the state.

[101] SIMKINS, J. Appellant was convicted of the theft of cattle, and his punishment assessed at five years, from which he appeals. There are but two questions raised:

1. Appellant complains of the error of the court in overruling his motion for a continuance. Appellant was indicted January 12, 1892. The application was filed January 10, 1893, and based upon the want of the testimony of two witnesses. The application stated that one of the witnesses was a resident citizen of the county, but affiant learned this morning, for the first time, his residence was unknown. The other was in the county in January, 1892, when affiant asked for a subpœna, which he thought had been served, but learned January 3, 1893, that it had not been. There is no diligence whatever shown.

2. Appellant insists that the evidence does not support a conviction for theft, because the animal was not taken for the purpose of defrauding the alleged owner, but to conceal a previous theft. It seems, that in the winter of 1890, Frank Logan lost a yearling, which he found on the first day of April, 1891, branded and marked, and in the possession of one Kokernot, who penned it with others in the stockyards in Gonzales, for shipment. Kokernot bought it from one Dan Jacks, who got it from appellant. The night succeeding the day on which it was discovered by the owner, appellant, being notified of the discovery, went into the stockpen and shot the animal, and threw it into a well in the stockpen, and the next morning the animal could not be found by the owner, nor until the next winter, when the carcass was discovered in the well, and investigation of the matter began.

Now, while it clearly appears that the animal was fraudulently taken without the consent of Kokernot, who had it in possession and bought it, with intent to deprive him of the value thereof, yet it is also apparent that the taking was for the purpose of destroying it, and thus prevent its identification and proof of the first theft. The question arises whether such an act constitutes theft, the animal having been originally stolen [102] by appellant and sold, and the second taking being to conceal the first theft. It is not every taking

"without the consent of the owner, with intent to deprive the owner of the value thereof," which constitutes theft. Such acts may be nothing more than trespass or malicious mischief. To constitute theft there must be not only the fraudulent taking, but also the intent to appropriate the property to the taker's use or benefit. There can be no question that the act done was for appellant's benefit, though it was taken with intention to destroy it, not only to prevent his detection, but the repayment of its value to Kokernot. In *Dignowitty* v. *State*, 17 Tex. 530, 67 Am. Dec. 670, Judge Wheeler says: "To constitute the felonious intent, it is not necessary that the taking should be done *lucri causa;* taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender or another person, though not in a pecuniary way": 2 Bishop on Criminal Law, secs. 843, 847.

We think there was no error in the judgment, and it is affirmed.

Judges all present and concurring.

LARCENY—LUCRI CAUSA.—The taking of the property of another with intent to deprive the owner permanently of his property is larceny. It is not essential that the taking should be with a view to pecuniary profit: *State* v. *Slingerland*, 19 Nev. 135; *State* v. *Ward*, 19 Nev. 297; *State* v. *Caddle*, 35 W. Va. 73; *Dignowitty* v. *State*, 17 Tex. 521; 67 Am. Dec. 670; *State* v. *Davis*, 38 N. J. L. 176; 20 Am. Rep. 367; *Wilson* v. *State*, 18 Tex. Cr. App. 270; 51 Am. Rep. 309, and extended note. The secretly and unlawfully taking from the stable an animal belonging to another, and then killing it within a few feet of the stable door is larceny: *Delk* v. *State*, 63 Miss. 77; 60 Am. Rep. 46. The question as to whether *lucri causa* forms an essential element to the crime of larceny is further discussed in the extended note to *State* v. *Holmes*, 57 Am. Dec. 274.

CAMRON *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 180.]

EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE.—A state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime against his confederate, whether the latter is convicted or not. If his testimony is corrupt or his disclosures only partial he forfeits his rights under the contract.

EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE—PRACTICE THEREUNDER.—When a valid agreement to turn state's evidence has been made, and defendant has testified thereunder in good faith, upon the refusal of the prosecuting attorney to recognize the agreement, the

court generally continues the case to let the defendant obtain a pardon to plead in bar, but this cannot be done in Texas, as the pardoning power can be invoked only after conviction, and in such case the cause should be dismissed and a *nolle prosequi* entered.

EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE—PRACTICE.—When a defendant in good faith carries out his agreement with the state to turn state's evidence in consideration of exemption from prosecution, and the prosecuting attorney then refuses to recognize the agreement, the court should *nolle prosequi* and dismiss the prosecution, incorporating in the judgment the reasons therefor, which remains a perpetual record of self-confessed guilt.

EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE AS DEFENSE—PRACTICE.—When a defendant pleads, in defense to his prosecution, that he has in good faith performed his agreement with the state to turn state's evidence, in consideration of exemption from prosecution, his plea is wholly for the consideration of the court as to whether the case should be *nolle prossed* or dismissed, and is not a special plea in bar which must be submitted to and passed upon by the jury.

EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE AS DEFENSE—PRACTICE.—When a defendant sets up in defense of his prosecution a valid contract between him and the state to turn state's evidence in consideration of exemption from prosecution, fully performed in good faith on his part, and such defense is not denied by the state, the court should dismiss the case, incorporating in the judgment the reasons therefor. To sustain a demurrer to such defense in such case is reversible error.

E. J. Hamner and J. H. Glasgow, for the appellant.

R. L. Henry, assistant attorney general, for the state.

181 SIMKINS, J. Appellant was convicted of the crime of burglary, and his punishment assessed at two years confinement in the state penitentiary, from which he appeals.

The cause was carried, by change of venue, from Throckmorton to Haskell county. When placed on trial, appellant pleaded an agreement made by him with the county attorney of Baylor county, and others representing the state, by which he was induced to turn state's evidence against his confederate, J. J. Jones, in Baylor county, at the examining court, at which said Jones was bound over to await the action of the grand jury; that the state was unable, without his evidence, to convict Jones; that he was duly recognized to appear and testify before the district court; and that in all matters he has been ready to carry out his agreement. The state demurred, on the ground that such a plea was not authorized by law, and that the agreement was not with parties authorized to act. The court sustained the demurrer, and appellant was convicted, the wife of J. J. Jones being the principal witness against him.

There is but one question that need be considered: Did the court err in striking out the plea? From the earliest times it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations, by making criminals suspicious of each other, and it leads to the punishment of guilty persons who would otherwise escape: 1 Hale's Pleas of the Crown, 305; *Rex* v. *Rudd*, Cowp. 334; *People* v. *Whipple*, 9 Cow. 707. Therefore, on the ground of public policy, it has been uniformly held, that a state may contract with a criminal for his exemption from prosecution, if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not. If his testimony is corrupt, or his disclosure is only partial, he gains nothing, [102] but forfeits his right under the contract: 1 Bishop's Criminal Procedure, sec. 1164. The only difficulty in the matter seems to be as to the method in which the state may extend the promised and earned immunity. The common practice in American courts is to commit the question of receiving or rejecting an accomplice, and the further question of his immunity from punishment, solely to the discretion of the prosecuting officer, who acts by *nolle prosequi*. In those states where a *nolle prosequi* can be only entered with the consent of the court, as in Texas, the court must, of course, exercise supervision over the question: 1 Bishop's Criminal Procedure, sec. 1161.

But there is no question of the right of the prosecuting officer to act under and with the consent of the court in dismissing the cause. In some courts it has been held that when the agreement has been made, and defendant has testified thereunder, and the attorney for the state refuses to recognize the agreement, the court will continue the cause, to let the defendant obtain a pardon to plead in bar: 1 Bishop's Criminal Procedure, sec. 1164. This, however, cannot be done in Texas, as the pardoning power can only be invoked after conviction: Const., art. 4, sec. 11. In some courts it is held that where the accomplice is convicted after being made a witness by the state, and after having made a full confession, he has a claim for a judicial recommendation for pardon, which cannot be withheld without violating an established rule of prac-

tice: *State* v. *Graham*, 41 N. J. L. 15; 32 Am. Rep. 174; *State* v. *Lyon*, 81 N. C. 600; 31 Am. Rep. 518; *United States* v. *Ford*, 99 U. S. 594; *Garside's case*, 2 Lew. C. C. 38. But it would seem that the power of dealing with such agreements lies primarily with the prosecuting officer, and in Texas he may act with the consent of the court; and we can see no good reason why, when a defendant has in good faith carried out his agreement, the labor and expense to the state of a solemn trial should be incurred for the purpose of remitting the defendant to his remedy of pardon, to which, it is admitted, he is entitled as a matter of right: *Hardin* v. *State*, 12 Tex. Cr. App. 189. If the state can make a contract with the defendant for immunity from prosecution for his offense, it is due to her own dignity that the contract be carried out in perfect faith. If the reason for convicting the defendant be to place on record the proof of his guilt, then it does not apply in Texas. Under articles 38 and 593 of the Code of Criminal Procedure the prosecuting officer may, with the consent of the court, and for reasons filed and incorporated in the judgments of the court, *nolle prosequi* and dismiss the prosecution. It therefore remains a perpetual record of his self-confessed guilt: *Barrara* v. *State*, 42 Tex. 264.

In *Bowden* v. *State*, 1 Tex. Cr. App. 144, the well-considered opinion, which was affirmed in *Hardin* v. *State*, 12 Tex. Cr. App. 189, says it seems to have become a practice, recognized in our court, for the district attorney, with the concurrence of the court, to enter a [183] *nolle prosequi* in cases where it was deemed essential to the ends of justice that one or more defendants should turn state's evidence against his confederates: citing *Garrett* v. *State*, 41 Tex. 530; *Barrara* v. *State*, 42 Tex. 260; *Williams* v. *State*, 42 Tex. 392; *Wright* v. *State*, 43 Tex. 170; and the court reversed the case because the defendant was tried and convicted on a subsequent indictment, while under contract with the state, as state's evidence. The court says: "There has been no default on his part, and, until there is, the pledged faith of the state should have been kept inviolate in his immunity from further prosecution and punishment." The only objection urged to a defense of this kind is in *Holmes* v. *State*, 20 Tex. Cr. App. 517, and rests upon the ground that the code forbids any special pleas except former conviction or acquittal (Code Crim. Proc., art. 525), and that this is in the nature of a plea of estoppel. We do not think such a defense as we are here considering comes under the

character of special pleas which are to be submitted and passed upon by a jury, as former acquittal or conviction, or the constitutional plea of former jeopardy (*Johnson* v. *State*, 22 Tex. Cr. App. 222), but rather belongs to those matters addressed solely to the consideration of the court, and for which a *nolle prosequi* should be entered or the case dismissed; and where such a defense is set up, and not denied by the state, and it appears that a valid contract was made by the proper officers representing the state, and the contract has been carried out by the defendant in good faith, the court should dismiss the cause, setting up in the judgment the reasons therefor. In the case at bar the plea of appellant set forth that the agreement to turn state's evidence was duly made with an attorney representing the state, and before the examining court he testified fully as to the entire matter; that subsequently the county attorney of Baylor county ratified the agreement; that appellant has been in constant attendance on court, ready to testify in the case in compliance with his agreement.

It further appears that the wife of one of the convicted defendants testified against appellant on this trial. While it is true that any such contract should be made with the district or county attorney with the consent of the court (*Barrara* v. *State*, 42 Tex. 263; *Fleming* v. *State*, 28 Tex. Cr. App. 234), yet we think, where the court sees the contract was made and the defendant acted in perfect good faith, it should be recognized by the court. Mr. Bishop says: "In most cases the mere fact that an accomplice testifies as a witness for the government, and fully and freely acknowledges his own participation in the offense, will constitute an implied agreement, in the absence of an express one, for his exemption from further prosecution; but where the testifying is not with the concurrence of the state's attorney, and where there is no such understanding with any authorized person, or evidence [184] of expectation, it was held inadequate": 1 Bishop's Criminal Procedure, 1164. We think the court erred in striking out the plea on the grounds stated, and the judgment is reversed and the cause remanded.

Judges all present and concurring.

STATE'S EVIDENCE—AGREEMENTS CONCERNING.—From the earliest history of criminal law it has often been found necessary, in order to detect and punish crime, that resort be had to criminals themselves for the testimony necessary to convict their confederates; and on the ground of public policy

it is universally conceded that the state may contract with an accomplice for his exemption from prosecution provided he shall honestly, fairly, and in good faith make a full disclosure of the crime which he, together with his confederate, stands charged. In most cases the mere fact that an accomplice testifies as a witness for the state, freely and fully acknowledging his own participation in the crime, constitutes an implied agreement, in the absence of an express contract, for his exemption from further prosecution for that offense, whether his accomplice is convicted or not. "The government is bound in honor, under the circumstances, to carry out the understanding or arrangement by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court. If the district attorney shall fail to enter a *nolle prosequi* on the indictment the court will continue the cause until an application can be made for a pardon. The court would suggest that to discontinue the prosecution is the shorter and better mode": *United States* v. *Lee*, 4 McLean, 103. To the same effect, *People* v. *Whipple*, 9 Cow. 707.

Doubtless it is the almost universal practice for the prosecuting attorney, with the concurrence of the court, to enter a *nolle prosequi*, or to dismiss the charge against an accomplice who has performed his contract with the state, and in good faith has or is willing to turn state's evidence on condition that he is to be exempt from prosecution for that crime (*Barbara* v. *State*, 42 Tex. 260; *Williams* v. *State*, 42 Tex. 392; *Wright* v. *State*, 43 Tex. 170; *State* v. *Lyon*, 81 N. C. 600; 31 Am. Rep. 518; *State* v. *Graham*, 41 N. J. L. 15; 32 Am. Rep. 174), and a discharge by the court in such case, is, in legal effect, an acquittal, and a bar to another prosecution: *People* v. *Bruno*, 24 Cal. 41. There is probably only one state in which this practice does not prevail, and in that (Virginia) any protection which might be otherwise accorded to an accomplice turning state's evidence is taken away by statute providing that such evidence shall not be admitted in any case: *Commonwealth* v. *Dabney*, 1 Rob. (La.) 696; 40 Am. Dec. 717.

Although it is universally conceded that the district attorney or other public prosecutor may, with the consent of the court, enter into an agreement with an accomplice that if he will testify fully and fairly, in a prosecution against his accomplice in guilt, he shall not be prosecuted for the same offense, and that if the accomplice performs on his part, he is entitled to such protection as the law affords, yet the weight of authority upholds the proposition that if such an agreement is made with the prosecuting attorney alone, without the consent or advice of the court, it is of no effect as a protection to the accomplice if he is afterwards placed on trial in violation thereof: *State* v. *Graham*, 41 N. J. L. 15; 32 Am. Rep. 174; *People* v. *Peter*, 48 Cal. 251; *People* v. *Bruno*, 24 Cal. 41; *United States* v. *Ford*, 99 U. S. 594. "An accomplice is, in all cases, a competent witness for the prosecution, but whether in all cases he shall be permitted to become a witness, and thus earn an exemption from punishment, which is the implied condition of his turning informer and declaring the whole truth, is in the discretion of the court and the prosecuting officer": *Lineday* v. *People*, 63 N. Y. 143–153. This use of an accomplice, upon implied promise of pardon, is not at the pleasure of the public prosecutor, but rests in the sound judicial discretion of the court. A justice of the peace before whom prisoners are brought for examination cannot exercise such a discretion, and thereby bind the court in which the prisoners are indicted and tried, and the judges of the court itself cannot exercise it to bind the pardoning power; though in the

latter case, if the accomplice makes a full disclosure in good faith upon the trial, the implied promise of pardon is respected.

It is not matter of course for the court to admit an accomplice as a witness. Application for that purpose must always be made to the court, which admits or refuses to admit him in view of the particular circumstances of the case: *Wight* v. *Rindskopf*, 43 Wis. 344, 349, citing *People* v. *Whipple*, 9 Cow. 707.

If an accomplice testifies under a contract of this nature, entered into without the concurrence of the state's attorney, or any authorized public prosecutor, the contract affords him no protection when he is subsequently placed on trial for the same crime: *Commonwealth* v. *Woodside*, 105 Mass. 594; *Commonwealth* v. *Brown*, 103 Mass. 422; *Commonwealth* v. *Denehy*, 103 Mass. 424.

It has been held that it is within the discretion of the public prosecutor to determine whether or not an accomplice shall be permitted to become state's evidence, and also whether, if he does, he is afterwards entitled to exemption from further prosecution by reason of what he has done: *Runnels* v. *State*, 28 Ark. 121. This whole subject, as well as the right of the accomplice to interpose the contract faithfully kept by him, as a defense to his subsequent prosecution, is fully and excellently discussed in *United States* v. *Ford*, 99 U. S. 594–606, as follows:

"Waiving, for the present the question, whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider, in the first place, whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his accomplice in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution.

"Considered in its full scope, the argument is that in consideration of defendants testifying against their co-conspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but from all penalties and forfeitures they had incurred, and from liability from their internal revenue taxes which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, from all their fraudulent and illegal acts in respect to the public revenue.

"Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offense, and some of the decided cases and standard text-writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt some of the elements of the usage had their origin in the ancient and obsolete practice called approvement, which may be briefly explained as follows: When a person indicted for treason or felony was arraigned he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such approvement was only allowed in capital offenses, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty

the judgment of the law was against him, and the approver, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the approver should be condemned: 4 Blackstone's Commentaries, 330.

"Speaking upon that subject Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: 1. In the case of approvement, which, as he stated, then still remained a part of the common law, though he admitted that it had grown into disuse by long discontinuance; 2. By discovering two or more offenders, as required in the two acts of parliament to which he referred; 3. Persons embraced in some royal proclamation, as authorised by an act of parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

"Approvers, as well as those who disclosed two or more accomplices in guilt, and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth, and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

"Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained even at that date only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of approvement, modified and modeled so as to be received with greatest favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice, that if he behaves fairly and discloses the whole truth he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice, rests on the described usage and his own good behavior; for, if he acts in bad faith or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness: *Rex* v. *Rudd*, 1 Cowp. 331; 1 Leach, 115.

"Great inconvenience arose from the practice of approvement, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy, but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial: 2 Hawkin's Pleas of the Crown, p. 532, note 3; 3 Russell on Crimes, 9th Am. ed., 596.

"'In the present practice,' says Mr. Starkie, 'where accomplices make a full and fair confession of the whole truth, and are, in consequence, admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity, and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy': 2 Starkie's Evidence, 4th Am. ed., 15.

"'*Participes criminis*, in such a case, when called and examined as a witness for the prosecution,' says Roscoe, 'have an equitable title to a recommendation for the royal mercy; but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency': Roscoe's Criminal Evidence, 9th Am. ed., 597.

"Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule: *Ex parte William Wells*, 18 How. 307.

"Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court, having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

"Much consideration appears to have been given to the question in that case, and the court held that the only claim that the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar on an indictment against him for the offense, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon.

"Three-quarters of a century before that, ten of the twelve judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial, that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party time to apply for a pardon: *Rex* v. *Rudd*, 1 Leach, 125; 1 Chitty's Criminal Law, ed. 1847, 82; May's Criminal Law, 175.

"Attempt was made sixty years later in the same court to convince the judges then presiding that some of the remarks of the chief justice in *Rex* v. *Rudd*, 1 Leach, 125, before cited, justified the conclusion that the accomplice in such a case was by law entitled to be exempted from punishment; but Lord Denman replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defense to an indictment or an answer to the question why sentence should not be pronounced, saying, in substance and effect, that the right mentioned was only an equitable right, and that the court would postpone the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the crown for mercy: *Rex* v *Garside*, 2 Ad. & E. 275; *Rex* v. *Lee*, Russ. & R. C. C. 361; *Rex* v. *Hunton*, Russ. & R. C. C. 454.

"Other text-writers of the highest repute, besides those previously mentioned, affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon, that they have only an equitable right to a recommendation to the executive clemency; and they all hold that the prisoners under such circumstances cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defense on their trial.

"None of those propositions can be successfully controverted; but it is

equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the executive: 3 Russell on Crimes, 9th Am. ed., 597.

"Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith, and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillipps in his valuable treatise on evidence; but he, like the preceding text-writer, states that the accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify; that such an equitable title cannot be pleaded in bar nor in any manner be set up as a defense to an indictment charging them with the same offense, though it may be made the ground of a motion for putting off their trial in order to allow time for an application to the pardoning power: 1 Phillipps on Evidence, ed. 1868, 86.

"Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice: 1 Phillipps on Evidence, ed. 1868, 87; 3 Russell on Crimes, 9th Am. ed., 598.

"Good reasons exist to suppose that the same course is pursued in the courts of some of the states, where the English practice seems to have been adopted without much modification: *People* v. *Whipple*, 9 Cow. 707.

"Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney general how he shall conduct a criminal prosecution. Consequently, it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state.

"Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and, in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts will allow.

"Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reason-

ably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates.

"When he fulfills these conditions he is equitably entitled to a pardon, and the prosecutor and the court, if need be, when fully informed of the facts, will join in such a recommendation.

"Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may *nolle prosequi* the indictment, if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea, and plead over to the merits if his application for pardon shall be unsuccessful: 1 Bishop's Criminal Procedure, 2d ed., sec. 1076, and note.

"Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision.

"Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of approvement, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith, and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations: *Commonwealth* v. *Knapp*, 10 Pick. 477; 20 Am. Dec. 534. Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment; but if they refuse to testify, or testify falsely they are to be tried, and may be convicted upon their own confession.

"Nothing of weight, by the way of judicial authority, can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People* v. *Whipple*, 9 Cow. 707; *United States* v. *Lee*, 4 McLean, 103.

"Neither of those cases, however, support the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the governor, and the authority of the court extended no further than the recommendation for mercy; to which the court responded, that the legal presumption was that the public faith will be preserved inviolate, and that the equitable claim of the party will be ratified and allowed.

"Public police and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out; and the court proceeded to remark that if the district attorney failed to enter a *nolle prosequi* to the indictment, 'the court

will continue the cause until an application can be made for a pardon,' which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of approvement. More evil than good followed from that regulation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the executive, which, as Lord Mansfield said, rests on usage and the good behavior of the accomplice, who in a proper case will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled.

"Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a federal court will not be sacredly accorded to him by the president, in whom the pardoning power is vested by the federal constitution.

"Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court": *United States* v. *Ford*, 99 U. S. 594.

In Texas it has been decided that when the state, by her proper officers, has agreed with an accomplice to exempt him from further prosecution of the charge against him if he becomes a witness for the prosecution against his confederates, and he performs his part of the agreement fully and fairly, he is entitled to plead the agreement in bar of any prosecution thereafter upon the same charge. The reason for the rule is stated to be that to prosecute him in disregard of the agreement, and leave him to rely upon the pardoning power, is not in good faith, nor in compliance with the agreement: *Hardin* v. *State*, 12 Tex. App. 180; *Bowden* v. *State*, 1 Tex. App. 138. And if an accomplice, after making such an agreement, is subsequently again indicted for the same crime, he may interpose the agreement as a defense in bar, and should not be prosecuted so long as the agreement is subsisting, and he is alone prevented from a specific performance on his part by want of opportunity to perform: *Bowden* v. *State*, 1 Tex. App. 137. This rule, however, is contrary to the prevailing practice elsewhere; for it is generally held that the fact that an accomplice, under such an agreement, is introduced as a witness, and testifies to such facts as are within his knowledge, withholding nothing because of its tendency to self-crimination, does not constitute a legal defense as of right to a prosecution against him for the same charge in violation of the agreement. Under such circumstances the only right of the state's witness is that upon conviction he has an equitable claim to a judicial recommendation to the mercy of the pardoning power, upon application to postpone the case in order to give him an opportunity to apply for a pardon. Such recommendation cannot be witheld without a violation of an established rule of practice, nor is any case to be found where it has been withheld or an application for pardon denied after the accused accomplice has fully and fairly performed his part of the agreement: *United States* v. *Ford*, 99 U. S. 594; *State* v. *Graham*, 41 N. J. L. 15; 32 Am. Rep. 174; *State* v. *Lyon*, 81 N. C. 600; 31 Am. Rep. 518; *People* v. *Whipple*, 9 Cow. 707-712; *Newton* v. *State*, 15 Fla. 610; *United States* v. *Lee*, 4 McLean, 103.

If, after the jury is impaneled, an accomplice is, upon motion of the prosecuting attorney, discharged by the court for the purpose of using him as a witness for the prosecution, and he is so used, his discharge is an acquittal in legal effect, and bars another prosecution for the same crime: *People* v. *Bruno*, 24 Cal. 41.

An accomplice who consents to become a witness for the prosecution, under promise of pardon or exemption from further prosecution for the offense charged, must divulge all that he and his associates have said or done in relation to such crime, and cannot be excused from testifying to statements made by him to his attorney, as a matter of right, on the ground of their being privileged communications; and if he refuses to testify to all of the facts within his knowledge in relation to the alleged offenses he is entitled to no protection under the promise made to him: *Alderman* v. *People*, 4 Mich. 414; 69 Am. Dec. 321; *Hamilton* v. *People*, 29 Mich. 173; *State* v. *Condry*, 5 Jones, 418.

If an accomplice under promise that he shall not be prosecuted if he turns state's evidence and makes a full disclosure makes a confession, but subsequently refuses to testify against his accomplice, he may be put upon his trial, and his confession used as evidence against him: *Commonwealth* v. *Knapp*, 10 Pick 477; 20 Am. Dec. 534; *State* v. *Moran*, 15 Or. 262.

MEDRANO *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 214.]

BIGAMY—DURESS AS DEFENSE.—A defendant on trial for bigamy cannot plead in defense that his second marriage was entered into under duress to avoid a prosecution for the seduction of the woman he then married.

BIGAMY—MISTAKE OF LAW AS DEFENSE.—A mistaken belief on the part of a defendant charged with bigamy that his first marriage was void at the time of his second marriage, because his first wife had deserted him for more than three years prior thereto, is a mistake of law, and constitutes no defense.

No briefs were presented.

215 HURT, P. J. Appellant was convicted of bigamy, and his punishment assessed at two years' confinement in the penitentiary. He was under arrest for seduction, and being informed by his father and the district attorney that if he should marry the girl alleged to have been seduced, the prosecution would be dismissed, he married her, and having a living wife at the time, bigamy was alleged upon this second marriage. To this charge he interposed two defenses: 1. That he was in duress 216 when he married the second time. He was not, because our statute expressly provides that he may, under these circumstances, marry the girl alleged to have been seduced. Second defense is, that as the first wife had deserted him for more than three years, he was informed and

believed the first marriage had become void, and that he was released from same. If a mistake at all, this was a mistake of law, and could not be relied upon as a defense.

There is no error apparent of record, and the judgment is affirmed.

SIMKINS, J., concurs. DAVIDSON, J., absent.

BIGAMY—DEFENSES.—FIRST MARRIAGE VOID: See the extended notes to *State* v. *Johnson*, 93 Am. Dec. 253, and *Farrell* v. *State*, 30 Am. Rep. 617.

EX PARTE NEILL.

[32 TEXAS CRIMINAL REPORTS, 275.]

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE TO SUPPRESS NEWSPAPER. A city ordinance declaring a certain newspaper to be a public nuisance, and prohibiting its circulation within the city limits, is unconstitutional and void.

CONSTITUTIONAL LAW.—POWER TO SUPPRESS NEWSPAPERS or to prohibit their publication is not within the compass of legislative action by a state; and any law enacted for that purpose is clearly in derogation of the constitutional liberty of the press.

MUNICIPAL CORPORATIONS—POWER TO SUPPRESS NEWSPAPERS.—Municipal corporations are not invested with power to declare the sale of newspapers a nuisance, nor to suppress them by prohibiting their circulation within the city limits.

J. B. Dibrell, for the appellant.

275 DAVIDSON, J. On April 3, 1893, the city council of the city of Seguin ordained "that the *Sunday Sun*, a paper said to be published at Chicago, Illinois, is hereby declared a public nuisance, and its circulation prohibited within the corporate limits of the city of Seguin. Any person or persons offering to sell, barter, give away, or in any manner dispose of the *Sunday Sun* in violation of above ordinance, shall be punished in a fine not to exceed one hundred dollars."

Shortly after this ordinance should have gone into effect the applicant, a newsdealer in the city of Seguin, was arrested and fined in the mayor's court for a violation of said ordinance.

Resorting to a writ of *habeas corpus*, he was upon a hearing thereunder 276 remanded to custody, the county judge holding the ordinance valid; hence this appeal. This ordinance is in violation of the bill of rights, and therefore void.

Section 8 of the bill of rights declares that "every person shall be at liberty to speak, write, or publish his opinions on

any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

"SEC. 29. To guard against transgressions of the high powers herein delegated, we declare that every thing in this 'bill of rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

The power to prohibit the publication of newspapers is not within the compass of legislative action in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights. "The constitutional liberty of speech and of the press, as we understand it," says Mr. Cooley, "implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords": Cooley's Constitutional Limitations, 518.

To prevent the abuse of this privilege as affecting the public the legislature has prescribed penalties to be enforced at the suit of the state, leaving the matter of private injuries to be determined between the parties in civil proceedings.

We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance.

The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the

citizen with liberty to speak, write, or publish [277] his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege.

The judgment is reversed and the relator discharged.

Judges all present and concurring.

MUNICIPAL CORPORATION.—POWER TO ABATE NUISANCES GENERALLY: See the extended notes to *People* v. *Albany*, 27 Am. Dec. 98, and *Milne* v. *Davidson*, 16 Am. Dec. 194, and the note to *Orlando* v. *Pragg*, 34 Am. St. Rep. 25. The decision of a city government to remove a nuisance is conclusive, unless its charter powers are transcended, or the constitution is violated: *Baker* v. *Boston*, 12 Pick. 184; 22 Am. Dec. 421, and note.

EX PARTE BELL.

[32 TEXAS CRIMINAL REPORTS, 308.]

MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF VARIETY SHOWS. Although a city charter expressly confers the right upon the city council to prohibit, or to segregate and regulate bawdy-houses and variety shows, yet such right must be exercised in harmony with the criminal laws of the state.

MUNICIPAL CORPORATIONS—POWER TO REGULATE VARIETY SHOWS.—If a variety show or theater *eo nomine* has never been declared illegal, nor its existence a legal offense, nor a penalty affixed thereto by state law, it is not within the power of a city council, although express power is granted to regulate variety shows, to group together a certain number of acts, innocent in themselves, or not illegal, and, by calling it a variety show, undertake to prohibit it and punish parties engaged therein. The forbidden act must contain such elements as are defined and denounced by law.

MUNICIPAL CORPORATIONS—POWER TO REGULATE VARIETY SHOWS.—Where disorderly houses are defined and forbidden by state law, a variety show, to come within such prohibition, must, in effect, be a disorderly house. Without the elements which make it such it cannot be declared illegal by municipal ordinance, and when these elements exist, the inmates and proprietor may, under proper ordinance, be arrested and convicted of vagrancy, or punished as prescribed by the statute.

MUNICIPAL CORPORATIONS—ORDINANCES REGULATING VARIETY SHOWS.—Under a city charter authorizing its council to prohibit, segregate, and regulate bawdy-houses and variety shows, and determine their keepers and inmates to be vagrants, an ordinance declaring that any place is a variety show where persons congregate together and engage in music and dancing, or plays and exhibitions, and liquor is sold, offered for sale, or given away to any person present or visiting such place, is invalid, as being vague, indefinite, and uncertain, beyond the power conferred by the charter upon the council, and containing none of the essential elements of a disorderly house as defined and denounced by law.

Kittrell and Allen, and Perryman and Bullitt, for the relator.

[909] SIMKINS, J. Appellant was arrested, upon a charge of keeping a variety show, by the city marshal of the city of Houston, and at once sued out a writ of *habeas corpus* before the Hon. E. D. Cavin, judge of the criminal district court of Harris county, upon the ground that the ordinance under which such arrest was made was void, because it was *ultra vires*, the city council having no power to declare acts innocent and legal in themselves to be criminal, and because the said ordinance is too indefinite and vague to be the basis of any action. Under the authority of *Ex parte Gregory*, 20 Tex. Cr. App. 214, 54 Am. Rep. 516, the trial court suggested that the questions involved be referred directly to this court, and it was so brought. It was admitted on the part of the city that relator Bell is under arrest and in custody of the city marshal of Houston by virtue of the ordinance set forth in the petition for *habeas corpus*. [910] The object of this appeal is to determine the validity and legality of the ordinance hereafter set out.

The portion of the city charter bearing on the question, and which authorizes the city to pass an ordinance thereon, is as follows: "The city council shall have power to prohibit and punish keepers and inmates of bawdy-houses and variety shows, and to segregate and regulate the same, and determine such inmates and keepers to be vagrants." On the 24th of April, 1893, in pursuance of the charter, the city council passed the following ordinance:

"AN ORDINANCE TO DEFINE WHAT ARE VARIETY THEATERS AND VARIETY SHOWS, AND TO PROHIBIT THEIR EXISTENCE.

"Be it ordained by the city of Houston: *First.* That a variety theater or variety show, as contemplated by the provisions of this ordinance, is any room, tent, building, or place of any character or description whatever, where any person or persons, male or female, or both, engage in making music, singing, or dancing, or who participate in plays or exhibitions of any character whatever, where beer, wine, whisky, brandy, or any kind of intoxicating liquor is drank, sold, or offered for sale or exchange or barter, or solicited to be sold, or is given away, or in any manner offered or presented to any person or persons who may be present in or visiting such room or place, tent, or building, or any place or institution

that is commonly known or recognized as a variety theater or show, is included within the provisions of this ordinance.

"*Second.* Any person who shall in anywise participate in any of the performances, or engage in any manner in conducting, managing, or operating any variety theater or variety show, as defined by this ordinance, shall be deemed and held to be guilty of a violation of this ordinance, and, upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $100 for each offense, and each exhibition at such variety show or theater shall be deemed and held to be a separate offense, under the provisions of this ordinance.

"*Third.* This ordinance shall take effect thirty days after its passage.

"Passed April 24, 1893."

Conceding that the city charter confers the right upon the city council to prohibit, or to segregate and regulate the bawdy-houses and variety shows, that in fact such a right is expressly granted by the very terms of the charter, and that all powers necessary to carry out such right are also granted, yet it will not be denied that the granted right must be legally exercised in harmony with the criminal laws of this state. While the fact that the charter puts bawdy-houses and variety shows upon the same footing, and gives the city the right to prohibit or segregate them, evidently shows that the legislature regarded such shows as essentially, if not equally, vicious, yet a variety show or theater *eo nomine* has never [811] been declared illegal, nor its existence declared a penal offense, nor is a penalty affixed thereto by the law of this state: Pen. Code, art. 3. In the absence of such legislation it is certainly not in the power of the city council to group together a certain number of acts, innocent in themselves, or not illegal, and, by calling it a "variety show," undertake to prohibit and punish parties engaged therein. The forbidden act must contain such elements as are defined and denounced by law.

The legislature has passed a general law on this subject in what is known as the "Disorderly House Act." Acts 1889, page 33, articles 339, 341 *a*, declare any theater or playhouse where intoxicating liquors are sold, and prostitutes or lewd—that is, impure—woman or women of bad reputation are employed in any capacity, constitutes a disorderly house. Any variety show or theater combining these elements comes

within the prohibition of law, and is a disorderly house, whatever be the name given to it by the proprietors or the public. Without these elements it cannot be declared illegal. Where these elements exist the inmates and proprietor may, under proper ordinance, be arrested and convicted of vagrancy, as stated in the charter, or may be punished as prescribed by the statute.

Disorderly houses are forbidden by law, and a variety show, to come within the prohibition, must, in effect, be a disorderly house. The ordinance in question is too vague and indefinite to sustain a conviction. The declared object of the ordinance is to define variety theaters, and prohibit their existence; yet, if its definition is correct in declaring that a place is a variety show where persons gather together with music and dancing, and drink wine and other intoxicating liquors, then, indeed, the law may lay its hands on many a private and social gathering in the city of Houston. It will not do to say that such gatherings will not be disturbed by the officers of the law. That would leave it entirely to the officers' discretion when they should interfere. Criminal law, in Texas, whether statute or ordinance, must be plainly written to be effective. Nor is the latter part of the ordinance, "that a variety show is any place or institution known or recognized as a variety show," to be regarded as a definition. To punish a man for the violation of law which rests on what witnesses may consider a variety show is to make the law vary with witnesses and localities, if not with every jury, instead of being certain and definite, as criminal law must be. The ordinance here is not only vague and indefinite, but in fact contains none of the essential elements of a disorderly house, denounced by the law, and clearly within the power of the city to prohibit; and the further prosecution of the relator by virtue of the ordinance is hereby dismissed, appellant to pay the costs of this appeal, and be discharged from custody.

Relator discharged.

Judges all present and concurring.

MUNICIPAL CORPORATION — PENAL ORDINANCES — VALIDITY.—An ordinance not consistent with the general laws of the state is void: *In re Ah You*, 88 Cal. 99; 22 Am. St. Rep. 280, and note; *Robinson* v. *Mayor*, 1 Humph. 156; 34 Am. Dec. 625, and extended note. A municipal corporation cannot legislate criminally upon a case fully covered by the state law:

Mayor v. *Hussey*, 21 Ga. 80; 68 Am. Dec. 452, and note; *Ex parte Bourgeois*, 60 Miss. 663; 45 Am. Rep. 420. A municipal corporation may make penal an act which is already an offense against the state: *Van Buren* v. *Wells*, 53 Ark. 368; 22 Am. St. Rep. 214.

EX PARTE HOBBS.

[32 TEXAS CRIMINAL REPORTS, 312.]

EXTRADITION — RETURN OF FUGITIVE — SECOND ARREST WITHOUT NEW REQUISITION.—When a legally extradited fugitive from justice is delivered to the agent of the demanding state, and is carried by him out of the limits of the asylum state, when he escapes and returns thereto he may be rearrested upon an *alias* warrant issued by the governor thereof upon credible notification of the escape, without a new requisition from the governor of the demanding state.

EXTRADITION — RETURN OF FUGITIVE — SECOND ARREST WITHOUT NEW REQUISITION — HABEAS CORPUS. — After an extradited fugitive has escaped and returned to the asylum state, the extradition agent cannot gather an armed force and rearrest by violence in that state, but he may report the escape to its governor and ask his assistance, and the latter may then issue an *alias* warrant for the rearrest of the escaped fugitive without a new requisition from the government of the demanding state. In such case the fugitive has a right to show by *habeas corpus* that his second detention is illegal.

EXTRADITION—RIGHT TO HOLD ESCAPED FUGITIVE FOR CRIME COMMITTED IN ASYLUM STATE AFTER HIS RETURN.—When an extradited fugitive escapes and returns to the asylum state, and is there under arrest and examination for a felony committed there subsequently to his return and before his rearrest on the extradition charge, he may be held until the final disposition of such felony charge, before he is delivered to the extradition agent of the demanding state under a second warrant for his arrest and delivery for the extradition crime issued by the governor of the asylum state.

H. C. Mack and Throckmorton and Garnett, for the appellant.

316 SIMKINS, J. Relator was arrested under an executive warrant issued by the governor of this state, on the requisition of the governor of Tennessee, for the crime of murder committed in the state of Tennessee. This executive warrant was issued in February, and was duly executed in Collin county by the arrest and delivery of relator to one C. D. Heard, the duly authorized agent of the state of Tennessee. The said agent conveyed the said relator out of the limits of the state, and, while on his way to Tennessee, to wit, at Meridian, Mississippi, relator escaped from the custody of said agent and returned to Texas.

Afterwards, to wit, on the seventh day of April, 1893, upon the representation of the fact of the escape, and at the request of the agent, a second executive warrant for the arrest of relator was issued by the governor of Texas, and relator was arrested thereunder. Prior to the issuance of the second warrant, to wit, on the 22d of March, 1893, an attempt was made to arrest relator, in which one D. H. Oats, one of the posse attempting the arrest, was shot and wounded; and upon the 7th of April thereafter a warrant for his arrest was issued by one A. T. Andrews, justice of the peace, charging relator with an assault with intent to murder said Oats. Relator was arrested, and is now held, under this warrant, being bound over in the sum of two thousand dollars, and was so held at the time of the service of [217] the executive warrant aforesaid. On the 9th of May, 1893, the relator presented his petition for a writ of *habeas corpus* before the Hon. T. J. Brown, judge of the fifteenth judicial district, alleging he was illegally restrained of his liberty by J. L. Moulden, sheriff of Collin county, and one Hiram Church, who is the agent of the state of Tennessee; that the examining trial before the justice of the peace of Collin county, to wit, A. T. Andrews, for the assault upon Oats, is not yet concluded; and the relator claimed his discharge upon the ground: 1. That so far as the charge of assault with intent to murder is concerned, it is shown by the testimony set forth in said petition to have been done in his necessary self-defense, as the posse was attempting to arrest him without legal authority, and began to fire upon him without provocation or necessity; 2. That so far as the executive warrant is concerned the governor of Texas, having issued one warrant upon the requisition of the governor of Tennessee, had no authority to issue another warrant, and that he could not do so upon parol evidence; and the first warrant being *functus officio*, by the delivery and removal of the relator beyond the limits of the state, the governor had no right to issue a second warrant without new requisition. Upon hearing the application the district judge ordered relator to be held by the sheriff of Collin county until the charge against relator, pending before Andrews, justice of the peace, is disposed of, and then the relator should be delivered to Hiram Church, agent of Tennessee, in obedience to the requirements of the executive warrant of the governor of Texas. From these judgments relator appeals to this court.

We cannot concur in the proposition that when a fugitive

from justice is delivered to the agent of the demanding state, and is carried by him out of the limits of the asylum state, the power and duty of its governor absolutely ceases, and there can be no second delivery without a new requisition, however obvious the necessity. It would certainly be a most technical construction of a solemn duty imposed by the highest law in the land to hold that a fugitive from justice, who escapes from the agent while in transit, a short time after delivery, and returns to the state, cannot be rearrested by an *alias* warrant of the governor, if the first has been returned executed. The question is not affected by the escape being made within or without the limits of the asylum state, if in fact the fugitive is again found in the state after the escape. The executive of the asylum state has already, under the constitution and acts of Congress, been duly notified of the pendency of an indictment against the fugitive, charging him with crime, and demanding his extradition, and by the act of delivery the person so delivered is solemnly adjudged to be a fugitive from justice, subject to be returned to the demanding state. There is, indeed, no law prescribing what is to be done in case of interstate extradition where there is an escape, nor how nor by whom the governor of [818] the asylum state is to be notified of the fact of the escape. But it does not follow that the governor may not be credibly notified of the fact, and that it is not in his power to order the arrest. In fact, being the only authority which can order the arrest, it would seem to be his duty to do so. While it is right that he be notified, to prevent an illegal recapture, yet, where he is satisfied that there has been an escape, a due regard for the administration of the criminal law, and the security and welfare of the different states, demands that a person committing crime in one state should not find asylum in another. The agent appointed by the demanding state to receive the fugitive cannot bring an armed force to assist in arresting the fugitive.

No state can lawfully exercise its powers of arrest in the territory of another state. Representing a sovereign state, whose laws have been violated, he comes simply to receive, and looks to the executive of the asylum state to deliver, in obedience to the requirements of the federal constitution and laws. After delivery he may use all precaution to prevent escape, and insure safe carriage of the prisoner, and may follow in hot pursuit of recapture; but if an escape is in fact

accomplished, and the fugitive returns to the asylum state, the agent may not gather an armed force, and arrest by violence in said state, but should, before, report such escape to the executive, and obtain his assistance, and we can see no reason why the governor should not act on such information. There can be no possibility of an injury. The prisoner has a right, by *habeas corpus*, to show that his detention is illegal; that he has been acquitted or discharged by the court of the demanding state; or other cause entitling him to discharge. 7 American and English Encyclopædia of Law, title "Extradition," section 18, page 642, says: "If, after the fugitive has been delivered up to the demanding state, he escapes, by forfeiting his bond or otherwise, and again becomes a fugitive from justice the governor may order a second arrest and delivery."

2. But an important question arises in this case, out of the fact that pending the execution of the warrant of the governor the relator became subject to the jurisdiction of this state, by being charged with the commission of a felony, and was under arrest and examination for a violation of the laws of Texas when the second warrant of arrest issued by the executive of this state was executed upon him.

In *Taylor* v. *Taintor*, 16 Wall. 366, the court says: "When a demand is properly made by the governor of one state upon the governor of another the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied." By a violation of the laws of Texas, while a fugitive, the relator has been brought within the jurisdiction of our own courts. This jurisdiction, being operative, takes [319] precedence of the one claimed until its purpose shall have been completed. The governor of this state has no power, by the issuance of warrant, to arrest its action: Spear on Extradition, 444; 7 Am. & Eng. Ency. of Law, title "Extradition," 143, and note 2. It has been held by this court, that where relator is held under and by virtue of an extradition warrant, he is not entitled to bail: *Ex parte Erwin*, 7 Tex. Cr. App. 296. The relator is held under arrest under both the warrant of the justice of the peace and the executive warrant, and while the first is bailable, the second is not so. Therefore, while the relator may be kept until the final disposition now pending against him

in this state, he cannot be bailed; but it will be the duty of the sheriff to hold him in custody, and notify the state agent of Tennessee when the cause is finally decided, and deliver him to said agent, in pursuance of the executive warrant. The judgment of the district court is reversed, in so far as it orders the sheriff to deliver the relator to the agent of Tennessee after the determination of the cause in the justice court; and it is hereby ordered, in case relator is discharged by said justice, on hearing, that he be delivered to said agent, but if bound over by said justice, that he be held until final disposition of said cause, and then delivered to the said agent, in accordance with this judgment.

Ordered accordingly.

Judges all present and concurring.

EXTRADITION—SURRENDER—ESCAPE—SECOND ARREST.—Where one commits a felony in Michigan, and voluntarily comes into Indiana, and is arrested for a felony committed there, and a warrant for his arrest issued on a requisition from Michigan is received by the officer detaining him, but the accused escaping flees to Ohio, whence he is returned to Indiana upon requisition, upon the failure of the prosecution against him in Indiana, he may be surrendered to the authorities of Michigan on the requisition from that state: *Hackney* v. *Welsh*, 107 Ind. 253; 57 Am. Rep. 101. See the extended note to *Matter of Fetter*, 57 Am. Dec. 396.

CARROLL *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 431.]

WITNESSES—IMPEACHMENT BY COLLATERAL MATTER TENDING TO DEGRADE. A witness can be impeached by requiring him on cross-examination to testify and disclose collateral matters as to his personal history tending to disgrace but not to incriminate him.

WITNESSES—IMPEACHMENT OF BY COLLATERAL MATTER TENDING TO DEGRADE.—A witness may, on cross-examination, be asked any question which tends to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer such question, however irrelevant to the facts in issue, and however disgraceful to himself, except when the answer might expose him to a criminal charge.

WITNESSES—IMPEACHMENT BY COLLATERAL MATTER TENDING TO DEGRADE. If it can be made to appear on cross-examination that the witness has had a previous criminal experience, or has spent part of his life in jail, or has been convicted, or has suffered some infamous punishment, or has been in jail on a criminal charge, such matters tend to shake or impair his credit, and the jury should have such information.

WITNESSES—IMPEACHMENT BY MATTERS TENDING TO DEGRADE—LIMITATIONS ON EXAMINATION.—When a witness is cross-examined as to collateral matters tending to degrade him the court should limit the examination to transactions comparatively recent, bearing directly upon the present character of the witness, and essential to a true estimation of his testimony by the jury.

WITNESSES—IMPEACHMENT BY MATTER TENDING TO DEGRADE—LIMIT OF EXAMINATION.—When a witness is asked on cross-examination a question tending to disgrace him, and answers the question, the cross-examining party is, in general, bound by the answer, if collateral to the issue and only going to the credit of the witness, and contradictory evidence is not admissible to impeach him as to such matter.

WITNESSES—IMPEACHMENT BY MATTER TENDING TO DEGRADE.—A witness may, on cross-examination, be interrogated as to his having been imprisoned in a penitentiary or jail, whether after conviction or when he is under bonds to answer a preliminary charge.

I. P. Fowler and Jones and Garwood, for the appellant.

R. L. Henry, assistant attorney general, for the state.

433 SIMKINS, J. Appellant was convicted of theft of a pair of spurs, and his punishment assessed at one month imprisonment, from which he appeals.

Appellant complains that the court erred in permitting the state to prove, over his objection, by Frank Glass, a witness for appellant, that he, the said Glass, was then under indictment for theft.

The objection made was, that a witness could be collaterally impeached only by evidence of his general reputation for truth and veracity in the neighborhood in which he lives.

While the code declares that one may impeach his own witness in any way except by proving his bad character (Code Crim. Proc., art. 755), it is silent as to the methods by which one may attack the credibility of a witness offered by the opposite party. It simply refers us to the rules of evidence known to the common law for guidance: Code Crim. Proc., art. 725. Turning to the source, we find that of the various modes of impeaching a witness this alone has been the subject of much opposition and discussion; that is whether a witness can be compelled to answer a question degrading him, collateral to the main issue, but relevant to his credit. In other methods of impeachment the question is as to the application of the rule. In this the existence of the rule is denied. It seems, however, to be conceded that if the question is relevant to the main issue in the case the witness, upon cross-examination, is bound to answer, however degrading it may be to him. It is where the evidence is not

relevant to the issue, but only goes to affect his credit, that the authorities cannot be reconciled: 1 Best on Evidence, 130; 1 Greenleaf on Evidence, sec. 459; Wharton's Criminal Evidence, 8th ed., 474.

We may, therefore, follow the authorities whose reasoning appeals strongest to our judgment, and adopt that rule which tends to elucidate the truth, which is the object of all rules of evidence.

Now, while it is true that the question "has never been solemnly settled," as stated by Mr. Greenleaf (1 Greenleaf on Evidence, sec. 459), yet eminent judges, at *nisi prius* trials, began at an early day to permit [484] such questions to be asked, and compelled the witness to answer them: Wharton's Criminal Evidence, 474. Lord Eldon, in speaking of this practice, thus states the law in his day: "A party cannot be called upon to criminate himself; it used to be said a party could not be called on to discredit himself, but in modern times courts have permitted questions to show, from transactions not in issue, that the witnesses are of impeached character, and therefore not so credible."

So that it would seem that though the olden authorities were against the practice (1 Phillips on Evidence, 289, 294), yet the current of authority soon changed in England and America. Indeed, in his digest of the law of evidence, Sir James Stephen states the rules of cross-examination as follows: "Where a witness is cross-examined he may be asked any question which tends: 1. To test his accuracy, veracity, or credibility; or 2. To shake his credit, by injuring his character. He may be compelled to answer any such question, however irrelevant to the facts in issue, and however disgraceful to himself, except where the answer might expose him to a criminal charge": Wilson's Criminal Annotated Statutes, sec. 2511. This character of cross-examination is permitted upon the theory that where a man's life or liberty depends upon the testimony of another it is of the highest importance that they whom the law makes the exclusive judges of the facts and the credibility of the witnesses should know how far the witness is to be trusted. They ought to know his surroundings and *status*, so as not to give to one belonging to the criminal class the same credit as he whose character is irreproachable. If, therefore, it should appear on cross-examination that the witness had a previous criminal experience, or spent a part of his life in jail (*Real* v. *People*, 42 N. Y. 270; Thompson

on Trials, 458; 1 Greenleaf on Evidence, 455), or was convicted, or has suffered some infamous punishment, or had been in jail on a criminal charge (1 Best on Evidence, 130) it would tend to shake or impair his credit, and the jury should have such information. While it may seem hard to compel a witness to commit perjury or destroy his own standing before the court it would seem absurd to place the feelings of a profligate witness in competition with the substantial rights of the parties in the case.

But it is to be remembered, and all the authorities unite in the statement, that the examination must be kept within bounds by the court; that the question should only be permitted where the ends of justice clearly require it, and the inquiry relates to transactions comparatively recent, bearing directly on the present character of the witness, and is essential to the true estimation of his testimony by the jury: 1 Greenleaf on Evidence, sec. 459; Wharton's Criminal Evidence, secs. 474, 476; Taylor on Evidence, secs. 1314, 1315. It should be the care of the trial judge to confine the interrogatory to matters coming within the said limitations, and promptly suppress all inquiry into matters not recent or relevant to credit, otherwise the witness-box [435] would become a source of scandal and offense. It is also to be observed that when a witness is asked a question which tends to disgrace him, and answers the question, the cross-examining party is, in general, bound by the answer, if collateral to the issue and only going to the credit of the witness. For to admit contradictory evidence would raise collateral and independent issues not relevant to the main question: 1 Greenleaf on Evidence, 455; 2 Phillips on Evidence, 950; Best on Evidence, 200.

The doctrine contended for by appellant, which, in attacking credibility, limits inquiry to the general reputation of the witness for truth and veracity in his neighborhood, is as unsatisfactory in theory as it has been in practice. The proposition announced in *Boon* v. *Weathered*, 23 Tex. 684, 686, that one of vicious character "may still preserve the priceless virtue of truth, though every other virtue is gone," is not the teaching of human experience. Such a case would be deemed an exception so marked as should require the fact to be affirmatively shown. Among the dissolute and degraded we do not, naturally, seek nor expect to find this

best characteristic of manhood. Without proof to the contrary the jury may fairly assume that from the immoral and criminal character truth has fled with other virtues. While, therefore, the method of impeachment contended for is one of the recognized modes, we see no reason why it should be exclusive. We think the jury may reach, in many cases, a more satisfactory estimate of a witness' character from admissions drawn from his own lips upon cross-examination, than by impeaching his general reputation by other witnesses—a method seldom understood by even intelligent witnesses, and too often made the opportunity of malice and revenge. For experience clearly demonstrates that in most efforts to swear away the character of a witness animosity or injury is the incentive or cause of the most positive impeaching testimony.

Under these views we do not think the court erred in permitting the question to be asked. Again, this question of collateral impeachment came before this court in *Lights* v. *State*, 21 Tex. Cr. App. 309, in which it was held competent to discredit a witness by asking him if he had not been in the penitentiary. And the court expressly overruled *State* v. *Ivey*, in 41 Tex. 35, which held a witness could not be compelled to answer "whether he had not just come out of jail to testify." The Lights case held such a question clearly admissible, citing Wharton's Criminal Evidence, 474, and *Real* v. *People*, 42 N. Y. 270, in which the doctrine is laid down that a witness, on cross-examination, may be asked "whether he has been in jail, penitentiary, or other place that would tend to impair his credit." The case of *Lights* v. *State*, 21 Tex. Cr. App. 308, has been repeatedly followed in this state: *Woodson* v. *State*, 24 Tex. Cr. App. 162; *Williams* v. *State*, 28 Tex. Cr. App. 301.

Now, it seems from the foregoing authorities that a witness may be interrogated as to his having been in the penitentiary or jail, whether on [436] conviction or on a preliminary charge. But it is the nature of the charge rather than from the imprisonment that may affect credit; and it certainly does not seem clear why the fact of a person being able to give bond and thereby escape imprisonment should bar an inquiry into his credibility. The presumption of innocence is certainly no greater in favor of one under bond than one who, from his inability to give bond, is compelled

to undergo imprisonment. We do not think the court erred in permitting the question to be asked of the witness Glass.

There are no other questions that need be considered.

The judgment is affirmed.

Judges all present and concurring.

WITNESS—IMPEACHMENT BY SHOWING PREVIOUS BAD CHARACTER.—In impeaching a witness the inquiry may extend to general moral character: *Birmingham etc. Ry. Co.* v. *Hale*, 90 Ala. 8; 24 Am. St. Rep. 748, and note. For the purpose of discrediting a witness it may be shown that he has been convicted of a crime: *Commonwealth* v. *Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *State* v. *Howard*, 102 Mo. 142; *Helm* v. *State*, 67 Miss. 562; *Quigley* v. *Turner*, 150 Mass. 106; *Van Bokkelen* v. *Berdell*, 130 N. Y. 141. A witness may be asked if he has ever been convicted of a felony: *Hanners* v. *McClelland*, 74 Iowa, 318. See, for full discussion of this subject, the extended notes to *Allen* v. *State*, 73 Am. Dec. 771, 775; *Evans* v. *Smith*, 17 Am. Dec. 76, and the notes to *Stanton* v. *Parker*, 39 Am. Dec. 529; *Ayers* v. *Duprey*, 86 Am. Dec. 668; *Holmes* v. *State*, 16 Am. St. Rep. 20, and *Watkins* v. *State*, 14 Am. St. Rep. 157.

WITNESSES—IMPEACHMENT—COLLATERAL MATTER.—A witness cannot be compelled to testify as to his previous immorality when such testimony does not tend directly to prove some issue: *State* v. *Houx*, 109 Mo. 654; 32 Am. St. Rep. 686. A witness cannot be examined concerning collateral and immaterial matters for the purpose of impeaching him: *Fletcher* v. *Boston etc. R. R. Co.*, 1 Allen, 9; 79 Am Dec. 695, and note. See, also, the extended note to *Great Western etc. Road Co.* v. *Loomis*, 88 Am. Dec. 322.

WITNESSES—EXAMINATION—QUESTIONS TENDING TO DEGRADE.—A witness is not privileged from answering because his answer would expose him to disgrace and infamy, if the case is so situated that he cannot be exposed to the danger of conviction and punishment with respect to the matters disclosed by his answer: *People* v. *Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. But see *People* v. *Brown*, 72 N. Y. 571; 28 Am. Rep. 183, and note; *Lohman* v. *People*, 1 N. Y. 379; 49 Am. Dec. 341, and note; *People* v. *Mather*, 4 Wend. 229; 21 Am. Dec. 122, and note, and the note to *Louisville etc. R. R. Co.* v. *Hall*, 24 Am. St. Rep. 874.

DAWSON *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 585.]

BURGLARY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—On a trial and conviction for burglary, when the only evidence directly connecting the accused with the crime is that of a state's witness whose connection with the stolen property tends to implicate him as an accomplice, which he denies being, a new trial should be granted to allow the introduction of newly discovered evidence to establish the complicity of such witness as an accomplice in fact to the burglary.

BURGLARY—EVIDENCE—WAYBILLS.—On a trial of burglary from freight-cars waybills accompanying such cars, made out by clerks in the line of

their duty, are admissible as original evidence to prove that the articles therein mentioned were shipped in such cars. It is not necessary to produce the clerks making them, nor the person who packed or loaded the packages in the cars to testify to these facts. If such waybills are beyond the jurisdiction of the court parol evidence of their contents is admissible.

BURGLARY—EVIDENCE—WAYBILLS—SECONDARY EVIDENCE OF CONTENTS. On a trial for burglary of freight-cars, entries made by railway clerks in the line of their duty at the time of examining the contents of such cars to determine if any of the packages, as shown by the waybills accompanying the cars, are missing therefrom, are admissible as original evidence to show the original contents of such cars.

BURGLARY—EVIDENCE—MISSING PROPERTY IN POSSESSION OF ACCUSED.—On a trial for burglary of freight-cars, proof that articles found to be missing from a certain car were afterwards found in the possession of the accused is admissible, and sufficient to show that the missing articles were in fact taken from that certain car.

BURGLARY—EVIDENCE OF SUCCESSIVE BURGLARIES.—On a trial for burglary evidence of prior and subsequent burglaries, and of the character and kind of articles taken and afterwards found concealed on the premises of the accused, is admissible as tending to show a regular system of crime organized and carried on by a band of criminals of which the accused was one.

INDICTMENT for burglary from a freight-car.

Park and Nichols, and Hill and Birmingham, for the appellant.

R. L. Henry, assistant attorney general, for the state.

550 SIMKINS, J. Appellant was indicted and convicted of burglary, and his punishment fixed at two years in the penitentiary.

1. Appellant complains that the court erred in overruling his motion for a continuance. As we understand the record the only evidence of appellant's connection with the burglary was the evidence of John Dawson, that his uncle, the appellant, was absent from home on the night on which the cars were broken open. While the evidence conclusively shows that appellant was receiving the stolen property as fast as it was stolen 551 from the cars there is no proof of his personal participation in the burglary itself, outside of the above evidence of John Dawson. Now, the said witness denies that he himself was concerned in the burglaries; admits that he was keeping the grocery store for his uncle, but says he never had any of the stolen articles for sale at said store. If, in fact, he knowingly received and was selling stolen property, he was an accomplice. Now, by the absent witness appellant pro-

posed to prove that John Dawson was selling the stolen goods, and in the newly discovered testimony it strongly appears that the witness did have in his possession and sell some of the stolen property, if he was not actually concerned in the burglary itself. No testimony of this character was introduced on the trial. True, one of the witnesses on the trial swore that one night he saw John Dawson when he rattled one of the seals of the cars, but the state contradicted this witness on that point at once. Now, the court submitted the question of John Dawson being an accomplice in the burglary. The jury, on the testimony before them, may have believed him not so to be, and have found appellant guilty on his simple statement that appellant was absent on certain nights; and it was also upon this testimony, we presume, that the court based its charge of appellant's keeping watch.

We think the court should have granted a new trial, so as to have allowed appellant to show the complicity of John Dawson in the burglaries.

2. We do not think the court erred in admitting evidence of the waybills. There can be no doubt that the waybill which is made out and sent along with each car is evidence tending to prove that the articles therein mentioned were shipped in said car, as stated in said waybill. It is but a reasonable presumption, from the care and accuracy usually characterizing and absolutely necessary to the conduct of the volume of transportation on the railway. The waybills being entries made by proper clerks in their special departments, and in their line of duty, it would not be necessary to produce the clerk making them, nor the person who in fact loaded the packages on the car, nor the merchant's clerk who originally placed the articles in the box before its delivery to the carrier at its depot: 1 Greenleaf on Evidence, 115, 116. If the original waybills were admissible, but are shown to be beyond the jurisdiction of the court, parol evidence of their contents would be admissible. The entries made by the clerks at the time of examining the contents of the cars to determine if any of the packages were missing were admissible also as original testimony. But apart from the question of the admissibility of the waybills, we think the evidence sufficient to establish the fact that the cars were burglarized, and the goods found in appellant's house and on his premises were obtained therefrom. The articles found to be missing from car number 4,002 were a lawn-mower, a box of poultry food,

and other articles. This car came on to Paris, on the night of March 9th, with St. Louis [553] seals unbroken. On the night of the 11th it was broken open. On being afterwards examined it was found that a box of poultry food was gone, and a box broken open, and one lawn-mower and two handles left in it. The lawn-mower found in defendant's house had no handle. The finding of these articles, together with a wagonload of stolen articles plundered from the cars, and hid in every conceivable place about appellant's premises, certainly seems sufficient to remove any question of doubt as to the fact that the lawn-mower and box of poultry food were in fact taken from car number 4,002, as found by the jury.

3. We do not think the court erred in permitting proof of burglaries prior to and subsequent to the one for which appellant was tried, and the character and kind of articles taken from the cars, most of which were found upon the premises of appellant.

There is quite a difference between separate and independent crimes, though of like character, and a regular system of crime, organized and carried on by a band of criminals, as in the case at bar: *Hennessy* v. *State*, 23 Tex. Cr. App. 340; *Nixon* v. *State*, 31 Tex. Cr. Rep. 205; *Mason* v. *State*, 31 Tex. Cr. Rep. 309.

From December, 1892, until March 28, 1893, there was an almost nightly robbery of the cars, in spite of the watchmen of the company, and the fruits of the crimes were carried to appellant's house and store. It was done by the same persons, appellant giving them half the value, or selling and dividing the proceeds. Appellant was usually absent from his place of business on the nights of the robbery; and his cart and horse were furnished to bring the plunder from the cars to his house. On the night of the 28th of March one of the conspirators was killed while robbing a car, and a raid was immediately made on the premises of appellant, and a wagonload of articles was discovered concealed about his house and yard. The robberies ceased immediately after this night. Many of the articles were identified as coming from the cars. The evidence as to other robberies was controlled by the charge of the court. The object of admitting evidence of other stolen property was clearly explained, and the jury were duly cautioned that in passing upon appellant's guilt or innocence they were limited to the burglary of car number 4,002, and appellant's connection therewith.

The charge fairly presented all the issues; but for overruling the motion for continuance, the judgment is reversed and cause remanded.

Judges all present and concurring.

BURGLARY—EVIDENCE—RECENT POSSESSION OF STOLEN GOODS.—In a prosecution for burglary the unexplained possession by the defendant of the stolen goods raises a presumption of guilt: *Ryan* v. *State*, 83 Wis. 486; *People* v. *Sansome*, 98 Cal. 235; *Harris* v. *State*, 84 Ga. 269; *Mages* v. *People*, 139 Ill. 139; *State* v. *Scott*, 109 Mo. 226; *State* v. *Warford*, 106 Mo. 55; 27 Am. St. Rep. 322, and note; note to *Clark* v. *State*, 19 Am. St. Rep. 825.

EVIDENCE—SECONDARY—PRIMARY BEYOND JURISDICTION OF COURT.—The contents of a paper which is beyond the jurisdiction of the court can be proved by secondary evidence without accounting for the nonproduction of the paper: *Manning* v. *Maroney*, 87 Ala. 563; 13 Am. St. Rep. 67; *Knickerbocker* v. *Wilcox*, 83 Mich. 200; 21 Am. St. Rep. 595; *Chator* v. *Brunswick-Balke etc. Co.*, 71 Tex. 588. It being shown that the original of a document was without the state, it was competent to introduce a copy of such instrument: *Missouri Pac. Ry. Co.* v. *Gernan*, 84 Tex. 141.

McKENZIE *v.* STATE.

[32 TEXAS CRIMINAL REPORTS, 568.]

INDICTMENTS—JOINDER OF FELONIES—ELECTION BETWEEN COUNTS.—While there can be no such joinder of felonies in the same indictment as to include separate transactions in fact, yet, when the relation which the accused sustains to a certain transaction and the facts connected therewith are shrouded in doubt, the indictment may embrace, in separate counts, separate distinct felonies in connection therewith, and if, on the trial, distinct transactions are developed, the state may, at the request of the accused, be forced to elect upon which count or transaction to prosecute.

LARCENY—BRINGING STOLEN PROPERTY INTO STATE.—A person may be prosecuted and punished in Texas for larceny committed by stealing property beyond its boundaries and bringing it into that state. The county in which the accused is found is the county in which he should be prosecuted.

LARCENY—EVIDENCE—UNRECORDED MARK OR BRAND ON ANIMAL STOLEN. On a trial for larceny in bringing an animal stolen in one state into another, where the statute provides that an unrecorded stock brand or mark shall not be any evidence of the ownership of any animal upon which it appears, the brand on the animal stolen, if not recorded in such state where the prosecution takes place, is not admissible as evidence of ownership for any purpose, whether the statutes of both states on the subject are the same or not.

EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.—When a conspiracy to commit crime is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered

the act of all, and is evidence against all. Each is deemed to assent to or to commend what is done by any other in furtherance of the common object. But after the common enterprise is ended, whether by accomplishment or abandonment, one conspirator is not permitted, by any subsequent act or declaration of his own, to affect the others.

EVIDENCE—CONSPIRACY.—CONFESSION OF GUILT MADE BY ONE CONSPIRATOR after a conspiracy to commit a crime is ended is not admissible in evidence against his co-conspirators, nor against any one but himself.

EVIDENCE—CONSPIRACY.—DECLARATIONS OF A CONSPIRATOR or accomplice are receivable in evidence against his co-conspirators only when they are either in themselves acts, or accompany and explain acts, for which the latter are responsible, and not when they are in the nature of narratives, descriptions, or subsequent confessions.

EVIDENCE—CONSPIRACY.—Acts and declarations of a conspirator to commit crime made after the conspiracy is ended by accomplishment or abandonment, voluntary or compelled, are not evidence against his co-conspirators nor any one but himself, and though the object of the conspiracy is not ended, such acts and declarations are not evidence against a co-conspirator, unless they are in furtherance of the common design.

EVIDENCE—CONSPIRACY.—FLIGHT OF ONE CONSPIRATOR is not evidence of the guilt of another conspirator.

Cowan and Fisher, Smallwood and Smith, and Carter and Lewright, for the appellant.

S. H. Cowan, Ball and Burney, and R. L. Henry, assistant attorney general, for the state.

575 HURT, P. J. Conviction for theft of one "cattle," the alleged property of Cochran.

The indictment was obtained in Martin county. The case was by the court, of its own motion, transferred to Mitchell county.

The first count of the indictment alleges that the property (cow) was by appellant stolen in the territory of New Mexico, and was afterwards brought by him into this state, and that at the time of the presentment of the indictment he was in Martin county.

The second count is the same as the first, except that it charges that the defendant brought the cow into Terry county, and that it was unorganized, and was attached to Martin county.

The fourth count alleges the theft in Andrews county, and that this was an unorganized county, and attached to Martin county.

The first two counts declare upon the same transaction, differing only in regard to matter of venue. The third count declares apparently upon a distinct transaction from those

designated in the first and second. The fourth upon its face declares upon a transaction separate and distinct from the first, second, and third.

We have in this indictment three distinct felonies, apparently, charged against appellant. If the animal was in fact stolen in New Mexico it was not stolen in Terry county; and, if stolen in Terry county it was not taken in Andrews county. This pleading, however, is correct. In the same indictment there can be no such joinder of felonies as includes separate transactions in fact: Bishop's Criminal Procedure, sec. 448. What relation the accused bears to a certain supposed criminal transaction may frequently be shrouded in doubt. Was he a principal, accomplice, or a receiver in the transaction? Under such a state of case counts for each are permissible, yea, commendable practice. And if there be doubt as to whether the property was taken beyond this state or in an attached county the indictment should allege both. When, upon the trial, distinct transactions are developed at the request of the defendant, the state should be forced to elect upon which count or transaction it will prosecute. Such a request was not made in this case. We have mentioned this subject solely for the purpose of preventing mistakes in the future.

Two counts charge theft of the animal in New Mexico, and that the property was brought by appellant into this state, and that at the time this bill was presented appellant was in Martin county. The other, that the property was brought by him into Terry county, which was unorganized and attached to Martin county for judicial purposes. Either of these counts is sufficient, and, if either be proven, appellant was properly indicted in Martin county.

Counsel for appellant contend that this state has no authority to try and punish offenses committed beyond its jurisdiction, and that this offense was wholly committed in New Mexico, etc. Let us examine the [576] proposition. This state has no jurisdiction to try and punish a party for theft committed by him beyond its boundaries. But is this the case before us? Articles 798 and 799 define this offense: "If any person shall steal property beyond the boundaries of this state, and the acts and intents constitute theft in the foreign country, state, or territory under the laws thereof, and said acts and intents constitute theft under the laws of this state, shall bring said property into this state, he is liable to the

same punishment as if the theft had been committed wholly within this state."

What are the ingredients of this offense? 1. The acts and intents must constitute theft by the law of the country in which the property was taken; 2. Such acts and intents must constitute theft under the law of this state; 3. The thief must bring the stolen property into this state. This state does not propose to punish the party for theft committed beyond its borders, but proposes to punish him for stealing the property beyond its boundaries and bringing his plunder into this state. This is not only authorized by articles 798 and 799, but also by article 205 of the Code of Criminal Procedure, which provides: "Prosecutions for offenses committed wholly or in part without, and made punishable by law within this state, may be commenced and carried on in any county in which the offender is found." This prosecution was commenced (by indictment) in Martin county, the county in which appellant was found. This was correct practice, because this offense was committed in part without this state, and consummated in this state by the appellant bringing the stolen property into this state; that is, this is the theory of the state, and if in fact appellant did these things Texas would have the right to try and punish him therefor, and the procedure under the first and second counts is correct. If guilty, appellant could not be punished for theft in New Mexico, but for the theft and the act of bringing the plunder into this state.

By bill of exceptions it appears that Carrington (witness for the state) testified that he was in control, and that he had the management of a herd of cattle in New Mexico branded with a mallet; that he never gave his consent to the defendant to kill such an animal. Counsel for appellant objected, because the ownership of the cattle could not be proven by an unrecorded brand, ownership not having been proven otherwise. The objection was overruled, the court explaining: "That it is not shown that New Mexico has such a statute as ours, to the effect that a brand is not evidence of ownership unless recorded, and it would be evidence at common law. It was not sought to prove ownership by the brand, but only care, control, and management." The defendant, on the stand as a witness, did not claim to have authority from any one to take or kill any mallet cattle.

Article 4560 of the Revised Statutes: "It shall be the duty of the clerks of [577] the county court in the respective coun-

ties to keep a well-bound book, in which they shall record the marks and brands of each individual who may apply to them for that purpose, noting in every instance the date on which the brand or mark is recorded; which record shall be subject to the examination of every citizen of the county at all reasonable office hours, free of charge for such examination."

Article 4561 of the Revised Statutes: "No brand except such as is recorded by the officer named in this chapter shall be recognized in law as any evidence of ownership of cattle, horses, or mules upon which the same may be used."

Whether New Mexico has or has not a statute with such provisions as these matters not, for, unless recorded as required by our statutes, the brand on the animal shall not be recognized by our law as any evidence that the animal bearing it belongs to any person. The common law has nothing whatever to do with this question, it being settled by our statutes. It is not necessary for us to discuss the question as to whether a brand properly recorded in another state or territory would in the courts of this state be evidence of ownership.

Second explanation: If an unrecorded brand is not evidence that A owns the animal that bears it evidently it is no evidence that A has the management and control of the animal. This proposition is self-evident.

Third: That appellant failed to claim from any one authority to kill the animal does not make an unrecorded brand evidence of ownership. The court should have sustained appellant's objection to the testimony of Carrington; and, for the same reason, the evidence of J. M. Crowder and A. L. Crowley should have been excluded. Bills of exceptions numbers 16 and 17.

Bill number 18: McLish, an Indian police-officer, testified that about the seventeenth day of July, 1892, he arrested Henry Harding in the Indian Territory, and, in making the arrest, he and said Harding exchanged pistol shots. Counsel for appellant objected, because if there had once been a conspiracy between Harding and appellant it had ended, etc.

Bill number 19: The state also proved by McLish that when he arrested Harding he (Harding) stated that he did not expect to be caught so soon; that he expected to leave there that night.

Bill number 28: The state introduced in evidence two cer-

tified copies of bail bonds of Henry Harding, for his appearance before the examining court of Donley county on the sixth day of July, 1892, and certified copies of judgments declaring forfeitures of said bonds. To this bill the court appends the following explanation: "The evidence was admitted on the hypothesis that the conspiracy was not at an end, the cattle not having been driven to the 'Rocking Chair' pasture or sold." Appellant and Harding were arrested on or about the third day of July, 1892, and neither of [578] these parties was engaged in driving the herd to Rocking Chair pasture when Harding was arrested, or when his bonds were forfeited. What is the rule? "Confessions of others. As to the prisoner's liability to be affected by the confessions of others, it may be remarked, in general, that the principle of the law in civil and criminal cases is the same. In civil cases, as we have already seen, when once the fact of agency or partnership is established, every act and declaration of one, in furtherance of the common business, and until its completion, is deemed the act of all. And so on in cases of conspiracy, riot, or other crime perpetrated by several persons, when once the conspiracy or combination is established the act or declaration of one conspirator or accomplice, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to assent to or commend what is done by any other in furtherance of the common object. Thus, in an indictment against the owner of a ship for violation of the statutes against the slave trade, testimony of the declaration of the master, being part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority as an agent of the owner in the conduct of the guilty enterprise, is admissible against the owner. But after the common enterprise is at an end, whether by accomplishment or abandonment is not material, no one is permitted, by any subsequent act or declaration of his own, to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself. If it were made in the presence of another, and addressed to him, it might, in certain circumstances, be receivable, on the ground of assent or implied admission. In fine, the declarations of a conspirator or accomplice are receivable against his fellows only when they are either in themselves acts, or accompany and explain acts for which the others are responsible; but

not when they are in the nature of narratives, descriptions, or subsequent confessions."

If it ever existed, the conspiracy was at an end, though the cattle were taken to Rocking Chair pasture. The members had been arrested, and Harding had forfeited his bond, and was in the nation, doing nothing whatever in aid of the common design.

What a conspirator does or says may be evidence against his co-conspirator, and it may not. This is the case, though the conspiracy may not be at an end. If ended by accomplishment or abandonment, and if the abandonment be voluntary or compelled, the acts and declarations of a conspirator are not evidence against any person but himself. Though the object of the conspiracy be not ended (accomplished), the acts and declarations of a co-conspirator are not evidence against another co-conspirator, unless they are in furtherance of the common design.

Application: If the exchange of shots between McLish and Harding, or Harding's flight to the Indian Territory, with consequent forfeiture of [879] his appearance bonds, were for the purpose of or tended to move, or aided in moving, the cattle to Rocking Chair pasture, then these acts might be evidence against McKenzie, his supposed co-conspirator. But how these acts could tend to or have that effect is beyond our comprehension. The flight of one co-conspirator is not evidence of guilt against another: *People* v. *Stanley*, 47 Cal. 113; 17 Am. Rep. 401.

The judgment of the court below is reversed and case remanded.

Simkins, J., absent.

Indictment.—Joinder of Felonies: See *State* v. *Warren*, 77 Md. 121, 39 Am. St. Rep. 401, and note, with the cases collected; also the monographic note to *Ben* v. *State*, 58 Am. Dec. 238.

Conspiracy—Acts and Declarations of Conspirator as Evidence Against the Others.—An act or declaration of one of several conspirators in the prosecution of their enterprise is considered the act of all: *Spies* v. *People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note at pages 478 and 489; and is admissible in evidence against them: *Clark* v. *State*, 28 Tex. App. 189; 19 Am. St. Rep. 817, and note; *Martin* v. *State*, 89 Ala. 115; 18 Am. St. Rep. 91, and note; *Commonwealth* v. *Tivnon*, 8 Gray, 375; 69 Am. Dec. 248, and note; *Johnson* v. *State*, 29 Ala. 62; 65 Am. Dec. 383, and note; *Tanner* v. *State*, 92 Ala. 1; *Knower* v. *Cadden Clothing Co.*, 57 Conn. 202; *Jolly* v. *State*, 94 Ala. 19. The acts and declarations in pursuance of the common purpose may be given in evidence against all only when such acts and declarations

are confined to the time intervening between the beginning and ending of the conspiracy and said and done in the presence of the other conspirators with their knowledge and consent: *People* v. *Parker*, 67 Mich. 222; 11 Am. St. Rep. 578; and the declaration of a conspirator after the consummation of the conspiracy is not evidence against the other conspirators: *State* v. *Brady*, 107 N. C. 822; *People* v. *Dilwood*, 94 Cal. 89; *Shelby* v. *Commonwealth*, 91 Ky. 563.

LARCENY—BRINGING STOLEN PROPERTY INTO STATE.—If a person commits larceny in one state and carries the goods stolen into another state, and there makes a removal of them, having the intent to steal, he may be indicted for larceny in the latter state: *State* v. *Newman*, 19 Nev. 48; 16 Am. Rep. 3; *Commonwealth* v. *White*, 123 Mass. 430; 25 Am. Rep. 116, and note. One may be indicted in one state for larceny by stealing goods in another state and bringing them into the former: *Worthington* v. *State*, 58 Md. 403; 42 Am. Rep. 338, and note; *State* v. *Cummings*, 33 Conn. 260; 89 Am. Dec. 208, and note; *State* v. *Ellis*, 3 Conn. 185; 8 Am. Dec. 175; *State* v. *Underwood*, 49 Me. 181; 77 Am. Dec. 254, and note; *State* v. *Seay*, 2 Stew. 123; 20 Am. Dec. 66, and note. The contrary doctrine is maintained in the following cases: *State* v. *Brown*, 1 Hayw. (N. C.) 100; 1 Am. Dec. 548, and note; *People* v. *Loughridge*, 1 Neb. 11; 93 Am. Dec. 325, and note; and *Lee* v. *State*, 64 Ga. 203; 37 Am. Rep. 67, and note. The larceny of goods in a foreign country and bringing them into Massachusetts does not constitute larceny in Massachusetts: *Commonwealth* v. *Uprichard*, 3 Gray, 434; 63 Am. Dec. 762, and note; and the same rule prevails in Ohio: *Stanley* v. *State*, 24 Ohio St. 166; 15 Am. Rep. 604. A statute providing that a person who shall bring into the state property which he has feloniously stolen in another state shall be guilty of larceny, and punished accordingly, is constitutional: *People* v. *Williams*, 24 Mich. 156; 9 Am. Rep. 119; *Hemmaker* v. *State*, 12 Mo. 453; 51 Am. Dec. 172, and note.

CASES

IN THE

SUPREME COURT

OF

TEXAS.

McDONALD *v.* INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY.

[86 TEXAS, 1.]

RAILWAY CORPORATIONS—SPEED OF TRAINS.—The law does not impose any rule as to the rate of speed of passenger trains. Hence the fact that in passing a small station such train was run at a high rate of speed cannot be regarded as negligence *per se*. On the other hand, it is always proper to submit to the jury the question, whether, under the circumstances of a particular case, the running of a train at a high rate of speed was or was not negligent.

RAILWAY CORPORATIONS—ACCIDENTS—FAILURE TO RING THE BELL.—Where the servants in charge of a train fail to ring the bell or blow the whistle, and such failure could not have been the cause of the accident, it is proper to so instruct the jury, and to tell them that the railway corporation cannot, because of such failure, be held answerable for the accident.

NEGLIGENCE is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what such a person would not have done under those circumstances. This definition does not exclude the idea that one may act upon appearances.

NEGLIGENCE—CONTRIBUTORY AND GROSS.—SLIGHT CONTRIBUTORY NEGLIGENCE of a person who is injured defeats his right to recovery though the defendant or his agents were guilty of gross negligence, provided the injury would not have been suffered except for the negligence of the plaintiff. This rule does not apply where the defendant or his servants discover the peril of the person subsequently injured, and do not use reasonable precautions to avoid injuring him.

CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF DOES NOT PRECLUDE HIS RECOVERY WHEN the conduct of the defendant is wanton and willful,

or where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness.

JURY TRIAL.—THE FAILURE TO GIVE AN INSTRUCTION WHERE NO REQUEST is made for it is not error.

S. R. Fisher, for the plaintiff in error.

A. S. Fisher and John C. Townes, for the defendant in error.

[4] GAINES, A. J. This case was before this court upon a former appeal, and is reported in 75 Tex. 41. Upon the last trial there was a verdict and judgment for the defendant, the International and Great Northern Railway Company. The suit was brought by the widow and children of one Dr. McDonald, to recover of the defendant corporation damages for his death. He was alleged to have been killed by a train of the defendant, through the gross negligence of its servants who were operating it.

The substance of the testimony, is so far as it bears upon the questions involved in the appeal, is stated as follows in the brief of appellant's counsel, as filed in the court of civil appeals:

"Dr. McDonald, the husband of Mrs. Mary McDonald, and father of the other plaintiffs, resided at Round Rock. Hutto is a station on the International and Great Northern road some ten or twelve miles east from Round Rock, having June 30, 1886, a few hundred inhabitants. The station-house and ticket-office was on the north side of the main track, between it and a switch, or sidetrack, on north side of the building. The business portion of the village was south of the railway and east of the station-house, and the residence portion mostly all on the north side of the track. Carpenter's store is some two hundred and sixty yards east of the station-house [5] and about forty yards south of the track. There were four public roads crossing the railway track within a distance of six hundred and ninety-two yards east of the depot, the nearest being, on its nearest side, about twenty feet from the east end of the platform, and the farthest about two thousand and seventy-six feet east from the depot.

"There was a street running parallel with the track and south of it between the company's right of way and the business houses, and all between these houses and the track was open. The country for many miles in every direction is open prairie. From Carpenter's store to the depot the

usually traveled way leads from his store door in a northerly direction nearly to the track, then almost parallel with the track, until almost to the end of the depot platform, which was just south of and extending a little east of the depot building, where said way crossed the track. This crossing at the depot was the one used by parties in loading and unloading on the platform, and by the public generally having occasion to go from the business part of town to the depot.

"On the morning of June 30, 1886, Dr. McDonald had been called to Hutto to see a patient. His purpose was to return to Round Rock that night. The schedule time for the south or west bound passenger train at Hutto was then between four and five o'clock P. M.; at that hour the doctor was at the station ready to embark, but the train did not come in, and he was told by the station agent that it was about three or four hours late. He procured his ticket. As the train would not be along till late the doctor went up to Mr. Carpenter's house and took supper, and, as that gentleman was going off on the same train, the doctor went with him after supper to his store to await the arrival of the train. Night came on. The freight trains uniformly blew or whistled for this station at a point near the stockguard east from the station-house, and passenger trains between this stockguard and the bridge at a point from three hundred to four hundred yards nearer the depot than the place where freight trains were accustomed to whistle. Headlights on trains approaching at night from the east could be seen several miles. At about eight o'clock (Carpenter and McDonald still being at Carpenter's store), Carpenter looked out and saw a headlight of a train approaching from the east, a mile and a half or two miles distant. He watched it until it passed the point where freights were accustomed to whistle; it passed without any signal; he concluded it was the belated passenger, and so informed Dr. McDonald. Dr. McDonald was deaf.

"Carpenter and the doctor started from the store to go to the depot. Upon reaching the gallery of his store Carpenter went back to be sure about the lights and the fastening of his store. When he again came to the front the doctor was some distance on his way to the depot. The train passed the usual signal point for freights, and again failed to blow the whistle. Carpenter, from his position, saw that it was a freight. Dr. McDonald continued his way to the depot, by just what route is left uncertain, some testimony tending to show that

he was in the road just [6] south of and parallel to the track, and some that he was not in the road, but in the space between it and the track. Passenger trains were in the habit of always stopping at the depot, and almost always slackened their speed east of and before reaching same to enable them to stop just opposite. Freight trains almost invariably did the same thing. A large number of witnesses swear that no whistle was blown or bell rung until the train had reached or passed the depot. The brakeman and conductor state that they do not remember any signals prior to the whistle for brakes just after the doctor was hurt. The fireman and engineer state that the whistle blew about half a mile east of the depot, and the bell rang for some distance before Dr. McDonald was struck. The train was going, at the time Dr. McDonald was struck, at a speed estimated at its slowest rate at twelve miles, and the highest rate at thirty-five miles an hour. It did not slow up or lessen its speed at all until the doctor was hit. Neither the engineer nor conductor nor brakeman saw the doctor before he was struck.

"The fireman gives the occurrence as follows: 'All the facts and circumstances, as near as I can remember, concerning the accident, are as follows: We were passing through Hutto; I saw a man approaching the railroad track from the south side; he was within twenty-five or thirty feet of said track, and running quite fast toward the depot; we were then about one hundred and fifty feet from the depot and about one hundred feet from where he was going to cross the track; when I first saw him, I called to him to look out; the engine bell was then ringing; and when we were within about fifty or sixty feet of said depot building he stepped on the track immediately in front of the engine, and it struck him and threw him to the south side of the track. At the time Dr. McDonald was struck I think the train was moving at the rate of about eighteen miles an hour. The locomotive whistle was blown about one-third or one-half mile before we reached the depot building, and the bell was rung about two hundred and fifty or three hundred yards before we reached the station. I saw Dr. McDonald approaching the railroad track from the south; he was about twenty-five or thirty feet from the track when I first saw him, and he was then about fifty or sixty feet from the engine, and coming somewhat with the train toward the track. He was then running pretty fast, and I called to him to look out, and continued ringing

the bell. Nothing was done by the engineer to stop the train until after the doctor was struck, and I have said what I, as fireman, did to prevent the accident. As I saw Dr. McDonald approaching the track nothing could have been done to prevent the train from striking him, as there was not time, and the engineer knew nothing of the man coming until after the engine struck him. The headlight of the train was burning.'

"One other witness saw Dr. McDonald at the time of the injury. He details the fact as follows: 'At the time he was hurt I was sitting on the [7] gallery of Carney's drug store. Dr. McDonald was going from Carpenter's store toward the depot, and moving in a fast run from the direction of Carpenter's store in order to get to the depot on the opposite side of the railroad. At the time the freight train was approaching at a rapid speed from the north, and just as Dr. McDonald stepped on the railroad the locomotive struck him and knocked him off the track about ten feet to the left. I saw the locomotive when it struck him, and went immediately to him. The train was moving at the rate of about thirty miles an hour. The whistle did not blow and the bell did not ring before the train reached the depot. After the train passed the depot twenty or thirty steps the bell rang and the whistle blew down brakes. Upon being informed that the train had struck a man the engineer signaled for brakes and reversed his engine, and did all he could to stop the train. The train was composed of the engine, tender, and sixteen or eighteen cars. The train did not stop until opposite the residence of Judge Goodman, about two thousand six hundred feet from where Dr. McDonald was struck. Dr. McDonald's body was found on the south side of the track, about forty-five or fifty feet east of the depot platform, and about twelve feet from the track, with his feet toward the track and his head down toward the embankment.'"

The testimony also showed that Hutto was a town with about five business houses, and a population varying in number from one hundred and fifty to two hundred.

The charge of the court, in so far as it bears upon the question involved upon the appeal, is as follows:

"3. The running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains. The defendant was entitled to its track for its trains to run upon, and its servants and

agents in charge of a running train had the right to act upon the presumption that the right of way for trains would be respected by persons approaching the track. This, however, would not excuse the running upon and over a person on the track. It was the duty of the servants and agents of defendant in charge of a running train on its track at all times, and especially in passing through towns or villages, and in approaching crossing places on its track where people were accustomed to pass, to keep a lookout, and if a person was seen upon the track and in danger, to check up or halt the train if it could be done by the exercise of ordinary care and by the use of ordinary means, to avoid inflicting injury upon such person.

"4. It was the duty of the deceased, Alexander McDonald, in approaching defendant's track at a crossing or at any other place upon the track, to exercise reasonable care for his own safety, and to look out and use the senses of which he was capable to ascertain whether or not there was danger from the approaching train, before attempting to cross the track.

"5. It was the duty of the servants and agents of defendant in charge of a running train on its track, on approaching a crossing upon the track, [8] to ring the bell or blow the whistle to indicate the approach of the train. The use of these signals is prescribed for the safety of those in the neighborhood of approaching trains; but the failure to perform the duty of ringing the bell or blowing the whistle would not relieve the person in danger from the duty of using his senses to ascertain the presence of the approaching train, and if such person was aware of the presence of the train, the failure of the servants and agents of defendant to ring the bell or blow the whistle would be immaterial.

"6. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done. The duty is dictated and measured by the exigencies of the occasion.

"7. Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences, and the conduct of the servants and agents of defendant cannot be considered gross negligence unless evidenced by an entire failure on their part to exercise care, or by the exercise of so slight a degree of care on their part as to

justify the belief that they were indifferent to the interest and welfare of others.

"8. Contributory negligence is the want of reasonable care on the part of the person injured which concurs with the negligence of the defendant, its servants and agents, in causing the injury.

"9. If the jury find from the evidence that on the thirtieth day of June, A. D. 1886, at Hutto, in the county of Williamson, in the state of Texas, said Alexander McDonald, while not in fault or guilty of negligence, was run over and injured by a train upon the railway of defendant, run by its servants and agents, such servants and agents at the time being guilty of gross negligence as defined in this charge, and that said Alexander McDonald was thereby killed, and plaintiffs are the widow and children of the said Alexander McDonald, deceased, then the jury will find for the plaintiffs as actual damages such amount as the said Alexander McDonald, deceased, would probably have earned by his intellectual and physical labor during the probable residue of his life if he had not been killed, which would have gone for the benefit of said widow and children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure; and the jury will, by their verdict, apportion the amount found by them among the plaintiffs, giving to the widow and to each of the children such share as the jury shall find by their verdict.

"10. If the jury find from the evidence that at the time and place charged, the said Alexander McDonald was killed by a train upon the track of defendant by the gross negligence of the servants and agents of the defendant, and further find from the evidence that the said Alexander McDonald, at and immediately before the injury, was himself guilty of negligence, and failed to use the care for his safety which his situation and circumstances reasonably required, and that his own want of care contributed to his death, then the jury will find for the defendant."

It is first complained that the court erred in the third paragraph of the charge, in so far as the jury were instructed that "the running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains." It is not claimed that there was any statute or ordinance regulating the speed of trains at the place of the accident; but it is insisted, in

substance, that in particular localities circumstances may demand that the trains should be run with such care and circumspection and at such rate of speed as not to endanger the lives of persons crossing the track of the railroad; and that when these circumstances exist the law imperatively requires that the rule should be observed. The evident purpose of the instruction was to tell the jury that it was not negligence *per se* to run a train at any particular rate of speed, and this was doubtless correct. The statute does impose the duty of ringing a bell or blowing a whistle when approaching a crossing, but it does not require that the speed of the train shall be diminished.

The charge does not instruct the jury that it might not be negligent to run a train rapidly under any state of circumstances, and does not preclude their finding that the rate of speed may not have been negligent under the facts of this case. There may be an act of negligence which is lawful in itself, but which becomes unlawful by reason of the circumstances attending it. Whatever we may do must be done with reasonable circumspection, so as to avoid doing an injury to another, either in his person or his property. We think, therefore, that it is neither incorrect, nor, in a proper case, misleading to instruct a jury that an act which is not forbidden by law is not an act of negligence in itself, provided they be left to determine whether the circumstances are such as to make it negligent in fact. If an instruction to the effect that the jury should decide whether the running of the trains at a rapid rate of speed was, under the circumstances of this case, negligent or not had been desired it should have been requested. A mere failure to give a proper instruction is not reversible error.

It is also complained that the instruction is upon the weight of the evidence, and is therefore erroneous. But we think the charge is not upon the weight of the evidence, and that the qualifications contained in the subsequent sentences in the same paragraph gave the jury the correct rule of law which governed the case. Taken together, the charge means that the train had the right of way, but that it was the duty of the trainmen to keep a lookout for persons on the track, and to take steps to avoid injuring them if discovered.

[10] In this same connection it is insisted that the court erred in refusing the following special instruction, requested on behalf of the plaintiffs:

"If from all the evidence in the case you believe that it was the duty of the parties operating the train referred to in plaintiffs' petition to slow up the speed of the said train as it approached the point at which Dr. McDonald was killed, then, in considering the question of contributory negligence on the part of Dr. McDonald, you are instructed that Dr. McDonald had a right to believe that the train would be slowed up, and to act upon such belief, unless from the conduct of such employees or servants it was apparent to him that the speed of the train would not be slackened."

This may have been proper as an argument to the jury, but it was not proper to be given as an instruction by the court. It is doubtful whether there was any sufficient evidence to authorize the jury to find that it was the duty of those in charge of the train to diminish its speed in passing the depot. It was a through train. The road at the place of the accident was straight and comparatively level, and the depot and town were in an open prairie country. The town of Hutto was a mere hamlet, and it was night, when few people were passing. The headlight was burning brightly. Did Dr. McDonald believe the train would slacken its pace? It had not done so when he stepped upon the track but a few feet in front of the engine; and the result would then have been the same, whether any attempt had been made to stop the train or not. The instruction seems to us a mere argumentative suggestion, well calculated to mislead the jury.

The third assignment of error is as follows: "The court erred in the fifth paragraph of its charge with reference to the duty of ringing bells and blowing whistles, because the same is on the weight of evidence, and because it instructs the jury that if Dr. McDonald knew of the approach of the train it was immaterial whether the bell had rung or the whistle blown, thus withdrawing from their consideration the failure to blow the whistle at the usual place for freight trains to give the signal, and the consequent deception upon the part of Dr. McDonald as to the kind and identity of the approaching train, which was a very material matter to be considered in determining his conduct, and whether he was guilty of contributory negligence."

Dr. McDonald, as the evidence conclusively shows, knew that the train was approaching. It follows that the negligence of the servants of the company, who were operating the train to ring the bell or blow the whistle, if they did fail

in the performance of that duty, was not the cause of the accident; and it was proper that the jury should be so instructed. It is evident that the charge was not intended to affect, and did not affect, the question whether the failure to blow at the usual place for freight trains misled Dr. McDonald as to the character of the train. If a charge was desired upon that particular question it should have been requested. It [11] may be gravely doubted whether there was any evidence to justify such an instruction. Whether in any event a charge upon that point should have been given we need express no opinion.

The sixth paragraph of the charge is also complained of, for the reason, as is insisted, "that it makes the question of negligence or not depend upon what a reasonable and prudent person would have done or would not have done under the circumstances of the situation, as these circumstances were shown at the trial to have in fact existed at the time; whereas, in determining Dr. McDonald's conduct, the true rule was the facts and circumstances as they existed, or he had been led by the acts and omissions of the defendant and its employees to believe they existed."

The charge is not subject to the construction which is placed upon it in the assignment. It clearly expresses a plain proposition of law. The words, "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done," do not exclude the idea that one may not act upon appearances. Facts which would lead a prudent man to believe in the existence of other facts which do not really exist are as much circumstances of the particular case as the real facts which are present to his mind.

It is also contended, on behalf of appellants, that the court erred in charging the jury that the plaintiffs could not recover if Dr. McDonald was guilty of negligence contributory to the accident, although the company's servants were guilty of gross negligence. Moreover, three special charges, presenting different phases of the doctrine insisted upon, were requested by the plaintiffs, and were refused by the court. Their refusal is also assigned as error. One was to the effect that if the servants of the defendant were guilty of gross negligence which was the proximate cause of Dr. McDonald's

death they would return a verdict for the plaintiffs, without reference to his negligence. Another was, in substance, that if the company's servants were guilty of gross negligence causing the death, then the negligence of deceased would not defeat a recovery, unless it was also gross. The other was to the effect that slight negligence on Dr. McDonald's part would not defeat a recovery, provided the negligence of the trainmen was gross.

In reference to the third special instruction requested on behalf of plaintiffs it is to be remarked that the jury had been charged to find for the defendant in the event they found that Dr. McDonald was guilty of ordinary negligence, although the negligence of the company's servants was gross. They were not warranted by the instructions in finding for the defendant on account of slight negligence on part of the deceased, provided the evidence otherwise justified a recovery by the plaintiffs. Therefore, the third special instruction was unnecessary, and it was not error to refuse it.

12 The question, then, is whether the ordinary negligence of the plaintiff will defeat a recovery, when the negligence of the defendant contributing to the injury is gross. In *International etc. Ry. Co.* v. *Garcia*, 75 Tex. 591, it is said: "The effect of contributory negligence on plaintiffs' right to recover has been recognized in all cases passed upon by this court in which it was involved, and the rule fixing liability or denying it on the basis of comparative negligence has been condemned." But it seems to us that the doctrine here invoked on behalf of the plaintiffs is the rule of comparative negligence in its simplest form. That rule is defined by Shearman and Redfield as follows: "The true rule of comparative negligence must be, that if the defendant has been guilty of gross negligence, and the plaintiff guilty only of such ordinary negligence as, when compared with the negligence of the defendant, might be called slight, though not slight when considered by itself alone, the plaintiff may recover": 1 Shearman and Redfield on Negligence, sec. 102. The following is to the same effect: "Reduced to a canon, it amounts to this: Slight negligence on the part of a plaintiff, although never so much contributory negligence, is not a defense to gross negligence on part of the defendant": Beach on Contributory Negligence, sec. 25. See, also, Pierce on Railroads, 328; Patterson's Railway Accident Law, 59; Bishop on Noncontract Law, sec. 471.

This is the doctrine of the supreme court of Illinois, and has been recognized in a modified form in Georgia and Tennessee. The text-writers generally agree that it is not now recognized as the law in the courts of any other state, or of the United States or of England. They also lay it down as an exceptional and unsound rule. There is an overwhelming weight of judicial authority against it.

The only case in this court which apparently recognizes the doctrine is *East Line etc. Ry. Co.* v. *Rushing*, 69 Tex. 317. There the court had charged the jury, in effect, that the plaintiff could recover if he "was only guilty of slight negligence and the defendant's servants were guilty of gross negligence." In the opinion the court say: "It is not complained that this charge is not good law, but that the facts did not warrant its being given, there being no proof that the defendant's servants or employees were guilty of wanton recklessness or gross negligence." The opinion then proceeds to show that there was evidence of gross negligence, and nowhere discusses the legal propositions announced in the charge. That proposition was, however, not erroneous, because if the plaintiff's negligence was only slight, that is to say, if he was not guilty of ordinary negligence, he was entitled to recover, provided the servants of defendant had been guilty of negligence, either gross or ordinary.

The doctrine that any degree of negligence which may be gross on part of a defendant will enable a plaintiff to recover, notwithstanding his own negligence, is unsound in principle. The damages allowed by law for a wrong negligently inflicted are given, except in peculiar cases, as a [13] compensation, and not as a punisment for the injury. Where the plaintiff's own negligent conduct has contributed to the injury—that is to say, where, but for his own negligence, the damage would not have occurred—to allow him compensation for his loss would be to compensate him for his own negligent misconduct. It is true, that in case of gross negligence exemplary damages may be allowed; but the rule in this state is, that, where there is no actual damage, exemplary damages cannot be recovered.

But there are cases in which a plaintiff who is chargeable with concurring negligence may still recover. If, for example, the servants of a railroad company discover a trespasser upon the track, they must use all reasonable precautions to avoid injuring him; and it may be also that where it is their duty

to keep a lookout for persons upon the track, and when, if this duty had been performed, one passing along it would have been discovered in time to have warned him or to have stopped the train, and this duty has not been performed, and the trespasser has been run over and injured, the company will be liable to respond in damages.

The negligence or trespass of a person does not place him beyond the protection of the law, and does not excuse another for the failure to exercise care to avoid injuring him; much less does it a justify willful injury. In such a case, although the negligence of the plaintiff, in one sense at least, contributes to the injury, the negligence of the defendant intervenes between the plaintiff's negligence and the result, and becomes the proximate cause of the injury. As some of the authorities put it, the plaintiff's negligence in such cases becomes the condition and not the efficient cause of the accident.

The leading case upon this subject is *Davies* v. *Mann*, 10 Mees. & W. 546, "where the plaintiff, having fettered the legs of his donkey, had turned him out into the public highway to graze, and while there the defendant, driving recklessly, ran over" and injured the animal. The plaintiff was held entitled to recovery. The decision is correct, and the rule is now the accepted law, though the case seems to have given rise to some confusion in determining later cases.

But in connection with the doctrine just announced, it has been laid down that "when contributory negligence is relied on as a defense to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome": 2 Wood's Railway Law, 1258. The author adds: "But, in order to avoid the defense of contributory negligence, it is not necessary that the wrongful act of the defendant, its agents, or servants should be wanton and intentional": Citing *Cook* v. *Central R. R. etc. Co.*, 67 Ala. 533; *Tanner* v. *Louisville etc. R. R. Co.*, 60 Ala. 621. In both the cases cited the servants of the respective defendants discovered the persons injured upon [14] the track in time to have avoided passing over them. They come strictly under the rule of *Davies* v. *Mann*, 10 Mees. & W. 546.

Judge Cooley says: "Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence

has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury": Cooley on Torts, 2d ed., 810. When the numerous authorities which the author cites are examined they are found in the main to be cases in which the defendant or his servants discovered the injured party in time to avoid the injury, or in which they ought to have discovered him. They do not support the doctrine that in every case of gross negligence the injured party may indemnify himself at the expense of the defendant, although by the use of ordinary care he could have avoided the injury.

That contributory negligence is no defense to an injury intentionally inflicted is clear. One who beats another cannot urge the defense that the plaintiff might have escaped the battery by running away. The words "wanton" and "reckless," as applied to this class of cases, seem to us to be somewhat indefinite in their meaning. If they are intended to apply to a case in which the defendant sees the danger of the plaintiff in time to prevent his injury, and takes no steps to prevent it, we fully concur in the proposition that the fact that the plaintiff negligently placed himself in position to be injured is not a defense to the action. Such is not the case before us. Dr. McDonald stepped upon the track of the railroad immediately in front of the engine, and in very close proximity to it, as is shown by the fact that he was thrown off on the side upon which he entered the roadbed. It was an act of negligence which the engineer could hardly have anticipated, even if he had been on the lookout and had discovered him running along the track.

We think the court did not err in its instruction in reference to contributory negligence; nor do we think there was error in refusing the requested charges on the same subject.

It is assigned that it was error to fail to charge the jury as to the duty of the defendant's servants to do what they reasonably could to avoid injury to Dr. McDonald after his danger was discovered, or by the use of ordinary diligence might have been discovered. A mere failure to give an instruction, when no request has been made for it, is not error.

Whether or not the verdict of the jury was contrary to the evidence is a question of fact which we have no power to determine.

The ruling of the court of civil appeals in this case is in conflict with the ruling of the court of civil appeals for the

first supreme judicial district upon the question of contributory negligence, as is shown by the case of *Texas etc. Ry. Co.* v. *Brown*, 2 Tex. Civ. App. 231. For this reason [15] this court has jurisdiction to hear and determine the cause, notwithstanding the judgment was reversed and the cause was remanded by the judgment of the intermediate court.

We find no error in the judgment of the district court of Williamson county, and therefore the judgment of the court of civil appeals for the third supreme judicial district is reversed, and the judgment of the district court is affirmed.

RAILROADS—NEGLIGENCE—HIGH RATE OF SPEED.—Running a railroad train at an unusual rate of speed is not negligence as to one who carelessly exposes himself to injury by voluntarily placing himself upon the track where he has no right to be: *Shackleford* v. *Louisville etc. R. R. Co.*, 84 Ky. 43; 4 Am. St. Rep. 189; but see *Vicksburg etc. R. R. Co.* v. *McGowan*, 62 Miss. 682; 52 Am. Rep. 205, and note. The general rule is that negligence cannot be inferred from the rate of speed alone at which railway trains are run: *Dyson* v. *New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82. See the notes to *Gilson* v. *Delaware etc. Canal Co.*, 36 Am. St. Rep. 818; *McMarshall* v. *Chicago etc. Ry. Co.*, 20 Am. St. Rep. 453, and *Peyton* v. *Texas etc. Ry. Co.*, 17 Am. St. Rep. 435.

RAILROADS—WHEN NOT LIABLE FOR FAILURE TO GIVE SIGNALS.—Until proof is given tending to show that the injury resulted from a failure to give a signal, the burden of proving that it did not arise from such failure is not thrown upon the corporation: *Galena etc. Ry. Co.* v. *Loomis*, 13 Ill. 458; 56 Am. Dec. 471, and note. See the extended note to *Gilson* v. *Delaware etc. Canal Co.*, 36 Am. St. Rep. 817, where the question of a failure to give signals as the proximate cause of an injury is discussed. See, also, the notes to *Quigley* v. *Delaware etc. Canal Co.*, 24 Am. St. Rep. 507, and *Welsch* v. *Hannibal etc. R. R. Co.*, 37 Am. Rep. 443.

NEGLIGENCE—WHAT IS.—Negligence is the failure to discharge the duty of taking ordinary care to the injury of one to whom the duty is due, such failure being the direct proximate cause of the injury to him: *Gunn* v. *Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842, and note.

NEGLIGENCE—CONTRIBUTORY, WHEN WILL NOT DEFEAT RECOVERY.—The contributory negligence of one injured will not defeat his recovery where he has been injured through the wanton, willful, or reckless conduct of the defendant: *Lake Shore etc. Ry. Co.* v. *Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218; *Florida etc. Ry. Co.* v. *Hirsh*, 30 Fla. 1; 32 Am. St. Rep. 17, and note; *Brannen* v. *Kokomo etc. Gravel Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and note; *Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301; 30 Am. Rep. 185, and extended note; *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344, and note. Contributory negligence on the part of the person injured will prevent recovery in an action for damages therefor unless the injury was the result of some intentional wrong on the part of the defendant: *Carroll* v. *Minnesota etc. R. R. Co.*, 13 Minn. 30; 97 Am. Dec. 221. Where a trespasser on a railroad track is injured by the negligence of the company he may not recover unless such negligence was willful: *Terre Haute etc. R. R. Co.* v. *Graham*, 95 Ind. 286; 48 Am. Rep. 719. Where an injury

might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages, notwithstanding the previous negligence of the plaintiff: *Deans* v. *Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note; *Virginia etc. Ry. Co.* v. *White*, 84 Va. 498; 10 Am. St. Rep. 874, and note.

APPEAL—INSTRUCTIONS.—Failure to give instructions not asked for is not error: *Mitchell* v. *Bradstreet Co.*, 116 Mo. 226; 38 Am. St. Rep. 592, and note.

SMITH *v.* CROSBY.

[36 TEXAS, 15.]

EXECUTION SALES.—IT WILL BE PRESUMED IN SUPPORT OF A SHERIFF'S DEED that he took the necessary steps required by law to make a valid sale, and sold all that he was authorized by his levy to sell.

A CONVEYANCE OF ALL A PERSON'S RIGHT, TITLE, AND INTEREST IN A TRACT OF LAND necessarily transfers such tract so far as owned by him. Hence, though he owns an interest less than the whole tract, whether it be an undivided part of the whole or a tract in severalty, his interest, whatever it may be, is transferred.

EXECUTIONS.—A LEVY ON ALL THE DEFENDANT'S RIGHT, TITLE, AND INTEREST IN A TRACT of land is valid though his interest does not extend over the entire tract, and is an undivided interest in a separate parcel thereof.

EXECUTION SALES.—EXTRINSIC EVIDENCE may be received to clearly locate and identify land passing by a sheriff's deed containing an accurate but general description.

EXECUTION SALES— INTEREST LEVIED UPON.—A levy, sale, and conveyance by a sheriff under execution of the interest of the debtor in a league of land will pass title to so much thereof as he owns.

JUDICIAL AND EXECUTION SALES ARE NOT SCRUTINIZED by the courts with a view to defeat them; on the contrary, every reasonable intendment will be made in their favor so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish.

Robert G. Street, and Scott, Levy, and Smith, for the appellants.

Willie, Campbell, and Ballinger, for the appellees.

[16] STAYTON, C. J. The adverse parties claim through J. Mayrant Smith, and, if the sheriff's sale passed his interest in the Bundick [17] league, then appellant has no right, for she claims through a conveyance made by him since the sale by the sheriff was consummated.

The ancestor of J. Mayrant Smith, defendant in execution, owned an undivided interest in the Samuel C. Bundick league, which was partitioned through a decree of the dis-

trict court for Galveston county, prior to the levy and sale under execution through which appellees claim, but the decree partitioning the land was not recorded until long after the sheriff's sale.

By the partition decree a particular part of the league was set apart to J. Mayrant Smith and coheir, and under this state of facts it is contended that the levy, sale, and sheriff's deed did not pass to the purchaser his interest in the league.

The levy indorsed on the execution, in so far as it described the land, was as follows: "All the right, title, and interest of the defendant, J. Mayrant Smith, in and to league number 6, Galveston county, originally granted to Samuel C. Bundick, and known as Virginia Point league."

The advertisement under which the sale was made was not produced, but the description of the land contained in the sheriff's deed, under which appellees claim, was the same the levy indorsed.

It is not claimed that the description of the league was in any respect uncertain or inaccurate; but it is contended that the levy, sale, and deed, for want of more particular description of parts sold, did not pass title to the purchaser to any part of the league owned by defendant in execution.

In the absence of evidence to the contrary, it must be taken as true that the sheriff took the necessary steps required by law to make a valid sale, and did sell all he was authorized by the levy to sell.

It seems to be contended that the words "all the right, title, and interest of the defendant" in and to the league of land described in the levy and sheriff's deed should not be given the same effect as would words declaring expressly that the land itself was levied upon, sold, and conveyed; but we cannot concur in this.

The words, as descriptive of the estate and quantity of land levied upon, sold, and conveyed, must be given the same effect as would be given to them in a conveyance voluntarily executed by an owner or claimant of land.

Nearly three centuries ago it was said: "If a man be seised of land in fee simple or for life, or have an estate in it for years, by statute merchant, staple, *elegit*, or the like, and he grant all his estate, or all his right, or all his title, or all his interest of and in the land, by this grant all his estate, and as much as he is able to grant, doth pass": Sheppard's Touchstone, 98; Elphinstone on Intrepretation of Deeds, 205.

This is one of the fixed rules regulating conveyances.

[18] When an owner of land, whatsoever his estate may be, conveys "all his right" therein, he passes to the person to whom the conveyance is made the same right he held, as fully as could he by words which in terms purported to convey the land. Conveyance of right in and to property necessarily transfers the property, in so far as owned by the person making the conveyance.

When the owner of land conveys "all his title" in and to it, he necessarily brings about the same result. When he conveys his "interest" in and to land he transfers whatever ownership he has, measured by estate and area of interest.

For a long time past, from solicitude to use words that would embrace every conceivable interest in lands, it has been usual to convey "all the right, title, and interest in and to" land described in a deed; and when such words are used, without other words limiting their effect, they must be held to convey the land as fully as was it owned by the maker of the deed.

If he owned the entire tract described in the deed in fee simple, that passes to his vendee. If he owned a less estate in the entire tract, that passes. If he owned in fee simple or lesser estate only a part of the tract described, whatever he owned passes. If he owned an undivided interest in the whole tract described, or only in a part of it, that which he owned will pass.

The same rule applies to levies, sales, and conveyances made by sheriffs in obedience to executions, unless there be some rule of law making them exceptions.

In *Brown* v. *Smith*, 7 B. Mon. 362, the rule was thus announced: "The objection made to the terms of the levy as being upon the right, title, and interest of Johnson in the land, and not upon the land itself, is untenable. The distinction is but nominal, and has been too frequently disregarded in making levies and sales for it now to be questioned whether a levy and sale in either mode is not sufficient, with the sheriff's deed, to pass to the purchaser such title as the defendant had subject to execution." The same ruling was made in *Humphreys* v. *Wade*, 84 Ky. 400.

In *Woodward* v. *Sartwell*, 129 Mass. 214, attachment was levied on "all the right, title, and interest" of the defendant in a tract of land, and it was held to be valid.

The court said: "The land itself may be conveyed, or the

right, title, and interest of the debtor in the same may be conveyed; and, if the latter form of deed is used by the officer, such estate as the debtor had in the premises at the time of the attachment would pass. The deed to the purchaser recites the attachment, the seizure, the notices, and the sale, and conveys 'the right, title, and interest which the said Wales L. Egerton had at the time when the same was attached as aforesaid in and [19] to the following described real estate.' We are of opinion that this was a sufficient deed to the premises. It was sufficient to describe what was to be sold—the right, title, and interest of W. L. Egerton, on the day of the attachment; and the deed of the same conveyed that which was attached."

In *Vilas* v. *Reynolds*, 6 Wis. 229, the levy of an execution on land was upon the "right and interest" of the defendant, which was held to be sufficient.

The same ruling was made in *Millett* v. *Blake*, 81 Me. 531; 10 Am. St. Rep. 275; *Parks* v. *Watson*, 29 Mo. 108; *Lewis* v. *Chapman*, 59 Mo. 381; *McLaughlin* v. *Shields*, 12 Pa. St. 287; *Swan* v. *Parker*, 7 Yerg. 490; 27 Am. Dec. 522.

The statute provides: "When a sale has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim which the defendant in execution had in and to the property sold": Rev. Stats., art. 2316.

The word "claim" does not add any thing to the certainty or extent of a levy, or to a conveyance made in pursuance of a sale made under it.

The rule that in sales under execution and in like sales the land sold must be designated with reasonable certainty, is as fully recognized in this state as elsewhere; but there may be a seeming conflict in the decisions made in the different states as to what amounts to a sufficient designation.

It has been held that a sale by a sheriff of an undesignated part of a larger tract of land, there being no means of distinguishing the part sold from the residue, is void. Among the cases so holding are the following: *Wofford* v. *McKinna*, 23 Tex. 36; 76 Am. Dec. 53; *Norris* v. *Hunt*, 51 Tex. 609; *Wooters* v. *Arledge*, 54 Tex. 395; *Pfeiffer* v. *Lindsay*, 66 Tex. 123.

In these and like cases no description of the land was given to which, with safety, might extrinsic evidence be applied for the purpose of locating it upon the ground.

In that class of cases extrinsic evidence could not be received, simply because there is no general yet accurate designation of the land given in the levy and deed by which extrinsic evidence must be controlled. In such cases, to admit extrinsic evidence to show the unexpressed intention of the officer, would be to make that operative as a conveyance instead of the deed.

In *Wilson* v. *Smith*, 50 Tex. 365, the levy and conveyance were on and of "one hundred and sixty acres of land, being a part of the homestead tract of said James Bankston, exclusive of two hundred acres exempt by law." The homestead tract embraced about three hundred and sixty acres of land, but the exempt two hundred acres had not been designated.

The levy and conveyance were held not to be void. "It was not a sale of so many acres out of a larger tract, with no means of fixing or locating the land sold, then or afterwards; but was a sale of that part of the tract remaining after the homestead was laid off."

That extrinsic evidence may be introduced to clearly locate and identify land passing by a sheriff's deed containing an accurate but general description ought not to be controverted, and is not an open question in this court: *Wilson* v. *Smith*, 50 Tex. 370; *Giddings* v. *Day*, 84 Tex. 608.

The rule in this respect is the same, whether the deed be one executed by a sheriff after a sale under execution, or one voluntarily executed by the owner of the land.

The sheriff's levy and deed are not ambiguous in the sense that there is uncertainty as to the meaning of the language used in describing the land levied upon and sold; for that can have but one meaning, which is, that the sheriff levied upon, sold, and conveyed to the purchaser every interest in the league of land described which the defendant in execution had at the time the levy was made.

There are a few decisions that seem to sustain the proposition that a levy, sale, and conveyance made by a sheriff under execution of the "interest" of the debtor in a tract of land described will not pass title to so much of the land as he owned.

These decisions seem to stand not so much upon the uncertainty of the land levied upon and conveyed, as upon a rule of public policy deemed necessary for the protection of the right of the debtor.

In *Whatley* v. *Doe ex dem. Newsom*, 10 Ga. 74, the levy was

on "all John Whatley's interest in lot of land, number not known, the place whereon said Whatley now lives." The deed conveyed "the interest of John Whatley in lot of land number 271, first district of said county" (Macon). There was no controversy as to the lot on which Whatley lived being lot number 271, as described in the conveyance; but it was contended that a levy, sale, and conveyance of Whatley's interest, without stating what that was, would not pass title.

In disposing of the case the court said: "Does the sheriff's deed sufficiently describe the land, so as to enable the purchaser to maintain ejectment for its recovery? We think not. The interest only of Whatley in the lot was levied on and sold, and conveyed by the deed, without specifying what that interest was; whether a mere possession, a term, a fee a succession, remainder, or any other estate, or whether in the whole or a part only of the land. Upon principle and policy, as well as authority, we are clear that this defect is fatal."

After stating that a debtor's interest might be sold under execution, the court said: "When the attempt is made to levy and sell that interest, should it not be described in such a way as that the creditor, debtor, and the public may all be notified what it is that is selling?"

[21] That decision was followed in another case, in which the levy was upon "a certain and all of the interest" of the defendant in execution in a lot described: *Williams* v. *Baynes*, 84 Ga. 116.

The case of *Jackson* v. *Rosevelt*, 13 Johns. 97, is cited as authority in the first of the decisions above noticed. In that case it appeared that a large tract of land extending over several counties was granted to some proprietors of what was known as the "Hardenburg Patent." This land was subdivided time and again between the proprietors and their descendants, when, after half a century from the time the grant was made, a certain lot vested in one of the heirs of one of the original proprietors, who died leaving five children, against two of whom a judgment was rendered. Execution issued under that judgment was levied, but the form of the levy does not appear.

In the sheriff's deed the land was described as "all the lands and tenements of Elizabeth Ellis and Sarah Van Kleeck, heirs and devisees of Laurance Van Kleeck, situated,

lying, and being in the patent commonly called and known by the name of the Hardenburg Patent."

Partition, before referred to, was confirmed by an act of the legislature, had been filed in the office of the secretary of state, and was shown to have been of great notoriety. The sheriff's sale and conveyance were held inoperative for want of sufficient description of the land.

That was an extreme case; and in view of its facts it may be that each of the subdivisions, or, as they were termed, lots, should have been deemed separate tracts of land as fully as though each had passed from the government as a separate grant.

The case of *Jackson* v. *De Lancy*, 13 Johns. 536, 7 Am. Dec. 403, is referred to in support of the rule announced in *Whatley* v. *Doe ex dem. Newsom*, 10 Ga. 74, but it has no bearing on the question. In that case the sheriff seized and sold two separate tracts of land, for each of which a certain sum was bid and paid, and these were conveyed to the purchaser; but the sheriff's deed went further, and undertook to convey "all other the lands, tenements, and hereditaments whereof the said William, Earl of Sterling, was seised within the county of Ulster."

Lands embraced within this general description were in controversy, and the court simply held that a sheriff could not pass title to land he had neither seized nor sold. In the course of the opinion, however, it was said "that the sheriff cannot sell any land on execution but such as the creditor can enable him to describe with reasonable certainty"; and with this statement no fault can be found, for it does not undertake to determine what would be such reasonable certainty.

The law does not require that in such sales the description must be such that the land may be identified by inspection of the levy and deed; and if the description be general, but sufficiently accurate to enable parties to identify the land levied upon and conveyed, by the use of such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient.

In one of the cases referred to it is said that the description must be such "as that the creditor, debtor, and the public may all be notified what it is that is selling." In another, that the officer must "so locate the lands as to afford means to the bystanders and bidders of informing themselves as to

the value"; while in another it is said that "the policy of the law requires not that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that at the time of sale it should be within the power of all who are by the notice invited to become bidders to know what was offered, and that it should not be left to be surmised or guessed at some future time as to what the officer intended to sell": *Herrick* v. *Morrill*, 37 Minn. 254; 5 Am. St. Rep. 841.

If the general description given be accurate, and such that, following and applying it, purchasers, by the use of that diligence and care usually exercised in examining title and ascertaining the value of land they contemplate purchasing, may ascertain what particular land or interest in it is offered for sale, can it be said that such persons have not present means of knowing what is offered for sale?

Can it be said, when land or interest in it is so described, that bidders have not means of informing themselves of its value?

When so described, can it be said that creditor, debtor, and the public are not notified of what is to be sold?

If we decide this case upon the weight of authority we must hold that under the description of "right, title, and interest" in the league of land passed every interest held by the defendant in execution.

If we decide in accordance with reason, keeping in view the right of debtors to have their property fairly sold, of purchasers to know what they are buying, and also the right of creditors to subject the debtor's property to sale in payment of his debts, we are forced to the same conclusion.

The impropriety of requiring a creditor to so describe a tract of land or interest in it owned by the debtor, that its locality or the interest therein may be determined from that description alone, is well illustrated by the facts in this case.

The law contemplates that the owners of land will place evidence of right on record, so that all persons dealing with it may know how the title stands, and the failure to record may result in loss to the owner if the land passes into the hands of an innocent purchaser.

A person desiring to know what, if any, interest J. Mayrant Smith had in the league of land described in the levy and deed, would go to that record to ascertain his right, and that would inform him that the father of J. Mayrant Smith owned

an undivided interest in the league, the extent of which might or might not be described by the record.

He would then ascertain whether the father was living, and, finding [28] that he was dead, would then inquire who inherited his estate or took it by devise. If the property was disposed of by will, from that he might ascertain, most frequently, in what proportion two or more devisees took the testator's interest in the land, or whether it went only to one person.

If he ascertained that the father died intestate, an inquiry would have to be made as to the persons and number of persons who inherited his estate, and the interest each one was entitled to.

From this he would ascertain that J. Mayrant Smith had an undivided interest in the league; but if he be a creditor seeking to subject that interest to the payment of his debt, must he determine from his own inquiry what the interest of his debtor is, and at his peril direct the sheriff to levy on only a specified, undivided interest in the league?

We think not; for the creditor ought not to be compelled to determine at his peril, in such a case, just what the undivided interest of the debtor is. If he conclude it to be an undivided fourth interest, and it should be so levied upon and sold, and it should afterwards appear that the debtor owned an undivided half interest, what would be the effect of the sale?

If such a sale would pass the interest sold, it might operate to the injury of both debtor and creditor, while a sale of the actual interest would have been beneficial to the latter.

The record would have shown, in connection with the inquiry as to the death of the father, that J. Mayrant Smith owned an undivided interest in the entire league, when in fact, by reason of the partition, he owned only an undivided interest in that part of the league given to the estate of the father in partition. The decree by which that partition was made was not recorded until after the levy and conveyance were made, although required by law to be recorded.

Under such state of facts, was the creditor under obligation to cause the levy and sale to be made only of the undivided interest in the part given to the estate of the father in partition? A rule that would require such a procedure would not further the ends of justice, but would encourage debtors to withhold from record their evidence of right, in order that

neither a creditor nor a sheriff could make or cause to be made a valid levy and sale of real estate.

The debtor does not need to be informed what interest he has in a tract of land accurately described; he is presumed to know the extent of his rights and its character; and when all his right, title, and interest in a tract of land sufficiently described is levied upon, he must take notice that a sale under that levy will pass all the interest he has.

No prudent man, contemplating the purchase of land at sheriff's sale under execution, relies upon the levy or proposition of the sheriff to sell in determining what part or interest in a tract of land sufficiently described in a levy and offer to sell he will acquire right to under a purchase; nor can he claim that it is the duty of the creditor to exercise a [34] higher degree of care for his benefit, in directing the levy, than self-interest will induce the purchaser to exercise for his own protection.

The purpose of advertisement is not solely to give notice of the time and place the sale will be made, but is also to afford persons desiring to purchase an opportunity to examine title, and to determine for themselves what land or interest in land they can acquire by a purchase. As to this they do and must rely upon their own judgments, based on such inquiry as they deem proper to make or to cause to be made.

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish": *White* v. *Luning*, 93 U. S. 514, 523.

The certainty necessary in the levy, sale, and conveyance of land under execution is thus well stated: "There may not be certainty to every intent, nor is it necessary there should be in such a case; certainty to a general intent, such as would put the owner and purchasers upon inquiry, affording the means of complete information, is all that can be expected": *Swan* v. *Parker*, 7 Yerg. 493; 27 Am. Dec. 522.

Decisions may be found in which it was held that under a levy, sale, and conveyance, such as that before us, title to lots in a town within the grant generally described would not pass; and this is in accordance with the statute in force in this state, which prescribes, that "if real property situated in any town or city, taken in execution, consist of several lots, tracts, or

parcels, each shall be offered separately, unless the same be not susceptible of a separate sale by reason of the character of the improvements thereon": Rev. Stats., art. 2305.

The statute further gives a defendant the right, when lands not situated in a town or city are taken in execution, if he be the sole owner, to have them sold in lots upon conditions named in the statute: Rev. Stats., arts. 2306–2308.

Neither these decisions nor statutes can have any bearing favorable to the proposition made by appellants, to the effect that no valid sale could be made of the interest of the debtor in the league unless it was in terms a sale of the undivided interest in the part of the league set apart to his father's estate by the decree of partition made in pursuance of a levy on that interest in the particular tract.

The disposition made of this case by the court of civil appeals was correct, and the judgment of that court, as well as of the district court, will be affirmed.

EXECUTION SALES—PRESUMPTION IN FAVOR OF VALIDITY.—The regularity of a sheriff's sale is presumed: *Childs* v. *McChesney*, 20 Iowa, 431; 89 Am. Dec. 545. The regularity of the proceedings leading up to a sheriff's sale will be presumed in the absence of evidence to the contrary: *Leger* v. *Doyle*, 11 Rich. 109; 70 Am. Dec. 240; *Howard* v. *North*, 5 Tex. 290; 51 Am. Dec. 769; *Greer* v. *Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note. An execution sale, regular on its face, may be presumed to be a *bona fide* sale: *Caswell* v. *Jones*, 65 Vt. 457; 36 Am. St. Rep. 879. Courts go very far in upholding judicial sales in presuming that officers executing their process have performed their duty: *Thomas* v. *Malcom*, 39 Ga. 328; 99 Am. Dec. 459, and note. Every reasonable presumption will be indulged in favor of sustaining the ministerial acts of officers making judicial sales: *Evans* v. *Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701, and note.

EXECUTION SALE—WHAT INTEREST OF DEBTOR PASSES BY.—A sheriff's deed to a purchaser at an execution sale passes all the title which the defendant held when the execution lien attached: *Greer* v. *Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note; *Zabriskie* v. *Meade*, 2 Nev. 285; 90 Am. Dec. 542, and note; *Coombs* v. *Jordan*, 3 Bland, 284; 22 Am. Dec. 236; *Walton* v. *Hargroves*, 42 Miss. 18; 97 Am. Dec. 429, and note; *Cotton* v. *Carlisle*, 85 Ala. 175; 7 Am. St. Rep. 29.

EXECUTION SALES—IDENTIFYING PROPERTY SOLD.—Parol evidence is admissible to identify premises intended to be conveyed in a sheriff's deed: *Bates* v. *Bank*, 15 Mo. 309; 55 Am. Dec. 145, and note. Evidence of extrinsic facts and circumstances is admissible to identify the premises sold or to apply the description thereto: *Herrick* v. *Merrill*, 37 Minn. 250; 5 Am. St. Rep. 841, and note.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY *v.* WELCH.

[86 TEXAS, 203.]

CARRIERS OF PASSENGERS ARE NOT REQUIRED TO USE ALL POSSIBLE CARE TO PROVIDE for the safe conveyance of passengers. Such carriers are not insurers of the safety of their passengers further than could be required by an exercise of such a high degree of forethought as to possible dangers, and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under similar circumstances.

G. H. Gould, for the appellant.

Brown and Ewing, for the appellee.

204 BROWN, A. J. Appellee sued appellant in the district court to recover damages for an injury alleged to have been received while riding upon appellant's passenger train as a passenger. The court of civil appeals for the first district has certified to this court the following questions: 1. Whether or not in such a case it is correct to charge the jury that the carrier must use "all possible care," without explaining or qualifying the sense in which the word "possible" is to be taken? 2. Whether or not the requirement that such care should be used to provide for a "safe conveyance" is correct? 3. Whether or not the failure to more fully explain the language used was positive error, or was simply an omission which should have been supplied by the request for a special charge?

We will consider the first and second questions together. It is not a correct statement of the law to say that a passenger carrier is bound to "use all possible care" to provide for the safe conveyance of passengers. Our supreme court has laid down the correct rule of liability in *International etc. R. R. Co.* v. *Halloren*, 53 Tex. 53, in which it is said: "Railroad companies, however, are not insurers of the safety of their passengers further than could be required by the exercise of such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances." This rule of liability is sustained by the best text-writers and nearly all the adjudicated cases: Hutchinson on Carriers of Passengers, secs. 500–502; 2 Shearman and Redfield on Negligence, secs. 495, 496; Cooley on Torts, 768; *Stokes* v. *Saltonstall*, 13 Pet. 191;

Sherlock v. *Alling*, 44 Ind. 201; *Farish* v. *Reigle*, 11 Gratt. 709; 62 Am. Dec. 666; *Hall* v. *Connecticut River Steamboat Co.*, 13 Conn. 326; *Derwort* v. *Loomer*, 21 Conn. 253; *Tuller* v. *Talbot*, 23 Ill. 361; 76 Am. Dec. 695; *O'Connell* v. *St. Louis etc. Ry Co.*, 106 Mo. 482; *Treadwell* v. *Whittier*, 80 Cal. 574; 13 Am. St. Rep. 175; *Pennsylvania Co.* v. *Roy*, 102 U. S. 451.

Any number of adjudicated cases to the same effect might be added, but these are deemed sufficient to show that the rule laid down is abundantly supported by the best authorities.

[205] In *International etc. R. R. Co.* v. *Halloren*, 53 Tex. 53, after stating the rule of liability as above quoted, Justice Bonner, delivering the opinion, said: "This, though, is not to be understood to require of the company every possible precaution which ingenuity might suggest or the skill of science might afford by which accidents may be avoided, but that it shall adopt such precautions of known value as have been practically tested, and should employ such skilled labor, service, and experience as is reasonably within its power to have secured."

Mr. Hutchinson, in his excellent work on Carriers of Passengers, section 501, says: "Although the form of expression is sometimes varied, and the rule is stated as requiring 'the greatest possible care and diligence,' 'the utmost care and diligence of very cautious persons,' 'the most perfect care of a cautious and prudent man,' and other similar phrases, the real meaning intended by them all is, that the care and circumspection to be required is the utmost which can be exercised under all the circumstances, short of a warranty of the safety of the passengers." And in section 502 of the same work it is said: "When it is said that the carrier of a passenger must provide for his safety 'as far as human foresight will go,' it is not meant he will be required to exercise all care and diligence of which the human mind can conceive, or all the skill and ingenuity of which it is capable."

In the case of *Levy* v. *Campbell* (Tex. Sup., April 19, 1892), 19 S. W. Rep. 438, the court approved a charge that the carrier is bound to use the "utmost practical care in providing for the safety of passengers"; and in *Gallagher* v. *Bowie*, 66 Tex. 265, this court approved a charge that the carrier is bound to use the "utmost care" to provide for the safety of passengers.

In the case of *Baltimore etc. R. R. Co.* v. *Worthington*, 21 Md. 288, 83 Am. Dec. 578, the term "utmost care" is de-

fined to mean "all the care and diligence possible in the nature of the case." Utmost care means the greatest care, and falls short of the expression of the charge used here, in this, that it is understood to apply to the surroundings as matters then stood and could be foreseen; but all possible care has a broader and more unlimited meaning. The word "possible," as used in this connection, means "capable of being done": Webster's Dictionary, word "possible." From the charge, as given, the jury must have understood that the carrier was bound to do every thing that it was capable of doing to prevent the injury. From the standpoint of the jury, looking at the occurrence retrospectively, there is, perhaps, scarcely an accident in the course of human affairs in which it would not appear that something could have been done which was not done to avoid the injury; yet viewed as a possible future danger, the very thing that would thus be suggested would never occur to the most cautious and prudent man as necessary to his own safety or that of others.

The charge is not more objectionable for what it means than for the [200] want of any definite meaning. The object of giving a charge to a jury is to furnish them a guide by which they can determine from the evidence whether or not the party sought to be charged has done or failed to do the things which by law create the liability. The term "all possible care" might be understood by one man to mean all that the party could foresee, while it might mean to another all that might have been done as viewed after the occurrence Besides, the law does not require every thing to be done which might be foreseen, but only such as might appear to be necessary, having that care for the safety of the passengers that a very prudent man would have, and to exercise that high degree of care that such man would exercise under the same circumstances.

Considering a charge upon the subject of negligence, this court said, in *Missouri Pac. Ry. Co.* v. *Brown*, 75 Tex. 269: "It seems to us that the charge is misleading, and that under it the jury could have had no proper conception of the law applicable to the case. It is probably true that juries fail to apply correctly to the facts a correct charge in which it becomes necessary to explain to them the different degrees of negligence, but it is the right of the defendant, when it is liable only when its employees have been grossly negligent, to have a charge correct in this respect." The

criticism is equally applicable to the charge under review. The jury could, from the instruction given, have no just or intelligent idea of what the law required the defendant to do to secure the safety of passengers.

In the nature of things the law must leave it to the juries in the exercise of a sound judgment, from their knowledge of men and the ordinary course of human affairs, to determine whether or not a carrier of passengers has exercised the degree of care required by law, and for that reason the charge should be such as to give the best direction to their investigation. It is within the power of railway corporations to secure prudent and competent persons to perform the service necessary in carrying passengers; they can provide the methods which have been tested and found practically valuable for securing immunity from danger; they have the means of enforcing the use of these methods and the exercise of this high degree of care. This the law wisely and justly requires, and the requirement should be rigidly enforced. To go beyond this is to require more than human foresight can provide, and, in effect, makes the carrier an insurer, which is greater liability than the law imposes upon it. The effect of the charge is to submit the case to the opinions of the jurors, not upon the evidence under the law, but opinions not controlled by law nor based upon evidence.

We have found but three cases which sustain the charge of the court. The supreme court of the United States in *Indianapolis etc. R. R. Co.* v. *Horst*, 93 U. S. 295, sustained a charge almost identical with that given in this case, and referred to *Philadelphia etc. R. R. Co.* v. *Derby*, 14 How. 486, and [207] *Steamboat New World* v. *King*, 16 How. 469, which support the doctrine announced. Considering those cases in connection with others decided by the same court before and since those quoted, we do not believe that court intended to go beyond the rule laid down by Mr. Hutchinson.

The charge given in the case under consideration was not merely a defective statement of the law, but was a statement of a proposition that was not the law of the case in any phase of it. It was positive error, and stood excepted to under the Revised Statutes, article 1361. No special charge need be asked under such circumstances. If the defendant had asked a special charge contradictory of this, and it had been given, it would not have cured the error, for the jury would have been left in doubt as to which was to govern them, and this

would have been error: *San Antonio etc. Ry. Co.* v. *Robinson*, 73 Tex. 277. It does not come within the rule laid down in *Robinson* v. *Varnell*, 16 Tex. 388; *Linn* v. *Wright*, 18 Tex. 317; 70 Am. Dec. 282; and numerous cases on that line.

CARRIERS OF PASSENGERS—DEGREE OF CARE AND SKILL REQUIRED.—Railroad companies, as to their passengers, are bound to exercise the utmost care and skill which prudent persons would be likely to exercise as to themselves under like circumstances: *Louisville etc. R. R. Co.* v. *Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378, and note. The law imposes upon carriers the duty of exercising the highest care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequence of the slightest negligence resulting in injury to the persons sustaining that relation to them: *Alabama etc. R. R. Co.* v. *Hill*, 93 Ala. 514; 30 Am. St. Rep. 65, and note; but they are not insurers of the absolute safety of their passengers: *Chicago etc. R. R. Co.* v. *Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483, and note; *Deyo* v. *New York etc. R. R. Co.*, 34 N. Y. 9; 88 Am. Dec. 418, and note; *Peters* v. *Rylands*, 20 Pa. St. 497; 59 Am. Dec. 746. *Contra*, see *Nashville etc. R. R. Co.* v. *Elliott*, 1 Cold. 611; 78 Am. Dec. 506, and note. This question will be found fully discussed in the extended notes to the following cases: *Philadelphia etc. R. R. Co.* v. *Anderson*, 20 Am. St. Rep. 490; *Louisville etc Ry. Co.* v. *Snyder*, 10 Am. St. Rep. 64; *Memphis etc. Ry. Co.* v. *Stringfellow*, 51 Am. Rep. 602; *Ingalls* v. *Bills*, 43 Am. Dec. 355, and *Heyeman* v. *Western R. R. Corp.*, 64 Am. Dec. 521.

NATIONAL BANK *v.* FINK.

[86 TEXAS, 303.]

PUBLIC OFFICERS—ASSIGNMENT OF, OR A LIEN UPON, SALARIES OR FEES OF. It is contrary to public policy for an officer to assign or give a lien upon his unearned compensation, whether it be salary or fees, and any such assignment or lien will be treated as void.

Millard Patterson and C. N. Buckler, for the appellant.

T. L. Nugent and M. W. Stanton, for the appellees.

303 BROWN, A. J. The court of civil appeals of the fourth supreme judicial district certify to this court the following question as involved in the above cause: "Is it contrary to public policy in this state for a public officer (he having qualified and being in office) to give a lien upon his unearned official compensation?"

The court makes the following statement of the facts: "The officer in this case was assessor of El Paso county, and to secure his promissory 304 note he gave appellant bank an express lien on 'whatever funds may be coming to me as the assessor of El Paso county, Texas, from the said county.'"

To this question we answer, that it is contrary to the public policy of this state for a public officer to assign or give a lien upon his unearned compensation which is given by law, whether such compensation be salary or fees, and that any such assignment or lien is void.

In England the authorities seem to be unanimous in holding such assignment void, as being contrary to public policy: *Flarty* v. *Odlum*, 3 Term Rep. 681; *Barwick* v. *Reade*, 1 H. Black, 627; *Arbuckle* v. *Cowtan*, 3 Bos. & P. 328; *Wells* v. *Foster*, 8 Mees. & W. 149; *Hill* v. *Paul*, 8 Clark & F. 307; *Palmer* v. *Bate*, 2 Brod. & B. 673; *Liverpool* v. *Wright*, 28 L. J., N. S., c. 871; *Davis* v. *Marlborough*, 1 Swanst. 79; *Stone* v. *Lidderdale*, 2 Anstr. 533; *Lidderdale* v. *Duke of Montrose*, 4 Term Rep. 248.

The American text-writers and courts nearly all follow the rule laid down in the English cases: Story's Equity Jurisprudence, sec. 1040 *d;* Mecham on Public Offices, sec. 874; Greenwood on Public Policy, 351; *Bliss* v. *Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Bangs* v. *Dunn*, 66 Cal. 72; *Schloss* v. *Hewlett*, 81 Ala. 266; *King* v. *Hawkins* (Ariz., Feb. 8, 1888.), 16 Pac. Rep. 434; *Bowery Nat. Bank* v. *Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507; *Field* v. *Chipley*, 79 Ky. 260; 42 Am. Rep. 215; *Schwenk* v. *Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438; *Webb* v. *McCauley*, 4 Bush, 10.

In *People* v. *Dayton*, 50 How. Pr. 143, it is held that the assignment of unearned fees does not fall within the rule sustained by the courts as to salaries. But in the case of *Bowery Nat. Bank* v. *Wilson*, 122 N. Y. 478, 19 Am. St. Rep. 507, this case was disapproved by the court of appeals of that state. It was there held that the same reasons applied against assigning unearned fees as to a salary, and that such assignment is void.

The validity of an assignment of unearned fees was the subject under consideration in *Schloss* v. *Hewlett*, 81 Ala. 266, and the court there held the assignment to be against public policy and void.

Field v. *Chipley*, 79 Ky. 260, 42 Am. Rep. 215, was a case involving the validity of an assignment of fees by a clerk, the fees being unearned, and the assignment was held to be void.

There is no distinction in principle between the assignment of unearned fees and the assignment of unearned salary. If any thing, the reason is stronger for holding such assignment of fees void than for holding a like assignment of a salary to

be invalid; because a salary is a fixed sum for a given time, and there could be no doubt as to the amount to which the assignee would be entitled; while in case of fees to be paid by a county or state, the officials would be required to go into a settlement of the question of amount, with many different persons in some instances, which would confuse and embarrass the public business: *Bliss* v. *Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273.

In *State Bank* v. *Hastings*, 15 Wis. 75, the court held that a judge of a [305] court could assign his salary before it was earned. The only reference made in that case to the great number of cases to the contrary is in this language: "It is true we have been referred to some English cases which hold that the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., was void as being against public policy; but it was not contended that the doctrine of those cases was applicable to the condition of society, or to the principles of law or public policy in this country." So slight a consideration of the number of cases decided by courts of eminent ability shows that the court in that case did not give sufficient thought to the question involved to entitle the opinion to weight.

In the case of *Mulhall* v. *Quinn*, 1 Gray, 105, 61 Am. Dec. 414, which is sometimes referred to as authority for the validity of such assignments, the matter in dispute was neither fees nor salary of a public officer, but was for the price of work done for a city.

Brackett v. *Blake*, 7 Met. 335, 41 Am. Dec. 442, is referred to, but in that case the question of public policy was not considered.

Macomber v. *Doane*, 2 Allen, 541, was a case in which an officer had assigned his salary, but the only question considered was as to whether or not it was assignable on account of its being a mere possibility. Public policy was not discussed nor mentioned in the case.

The case of *State Bank* v. *Hastings*, 15 Wis. 75, is the only case except *People* v. *Dayton*, 50 How. Pr. 143, that we find sustaining any such assignment when the case was placed before the court on the ground of violation of public policy. We have seen that the latter case was overruled, which leaves the former alone to support the assignment of such claims.

Flarty v. *Odlum*, 3 Term Rep. 681, is the leading English case on this subject. The assignability of the half pay of an

officer was in question, and Lord Kenyon said: "Emoluments of this sort are granted for the dignity of the state and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty."

Bliss v. *Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, is the leading American case on the subject. The court, discussing the question of public policy, gives this sound reason for its decision: "The public service is protected by protecting those engaged in performing public duties; and this not upon the ground of their private interests, but upon that of the necessity of securing the efficiency of the public service, by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law had appointed for their payment."

The court in *Schloss* v. *Hewlett*, 81 Ala. 270, holding that the assignment by a public officer of unearned fees was contrary to public [308] policy and void, said: "It is easy to see how great abuses would follow if such transfers were permitted. Not only would there exist a constant temptation to anticipate future earnings under the stress of present financial pressure, at usurious rates of discount, but, when completed, one of the strongest incentives to industrious exertion —the expectation of pecuniary reward in the near future— would be gone."

Dignity of office, in the sense that the term is used in the English cases, does not exist in this country; and yet there is a dignity, or at least should be, attending every office, in that sense that a proper and independent discharge of its duties inspires respect for the officer and for the office. In this more important sense of dignity the same reason can be well applied in this country. The law provides compensation for official service in order to enable the officer to be free from the cares of making provision for his own support and that of his family during the term of office, that he may devote his whole time to the discharge of the duties of his office. If such officer is permitted to assign his salary or fees before earned he may thus deprive himself and family of this support, and to secure it he must look to some other source, thereby depriving the state of the careful and thoughtful attention that the public interest demands. A hungry man

is weak in the presence of temptation, no matter what may be his ability to withstand it in a case of independence.

To deprive such an officer of the means of daily support for himself and family, while his time must be given to work in which he can expect no relief, would be a strong inducement to resort to methods which, if not dishonest, would at least be inconsistent with the public good, and the dignity of his office be destroyed by losing the respect and confidence of the public.

In this state the terms of office are short and elections frequent. The man in office who might be indebted to a creditor of influence and wealth might be greatly tempted to yield to the demands of such creditor in order to secure his influence in the next election; and a creditor having an insolvent debtor a candidate for office would have a strong incentive to lend his aid and influence to his election, in order to secure his debt by this means. It may be said that these are mere probabilities, but they are not impossibilities, nor are they too remote for consideration in this connection. There are other reasons which suggest themselves why such assignments should not be permitted, but these are sufficient to show the rule to be well founded.

This opinion will be certified to the court of civil appeals for its observance.

OFFICERS—ASSIGNMENT OF UNEARNED SALARY.—A contract for the sale and collection of the future salary of his office by a public officer is against public policy and void: *State* v. *Williamson*, 118 Mo. 146; *ante*, p. 358, and note, with the cases collected.

WEATHERFORD, MINERAL WELLS, AND NORTHWESTERN RAILWAY COMPANY *v.* GRANGER.

[86 TEXAS, 350.]

CORPORATIONS.—A PROMOTER, though he purported to act on behalf of the projected corporation, and not for himself, cannot be treated as its agent, because the nominal principal is not then in existence. Hence when there is nothing more than a contract by the promoter, in which he undertakes to bind the future corporation, such contract cannot be enforced.

CORPORATIONS.—CONTRACTS MADE BY PROMOTERS ON BEHALF OF A PROJECTED CORPORATION, within the scope of its general authority, may be adopted by it after its organization, and such adoption results from the corporation after its organization, with notice of the facts, accepting the benefits of the contract.

CORPORATIONS.—THERE IS NO IMPLIED PROMISE IMPUTED TO A CORPORATION to pay for the services of a corporator or promoter before it comes into existence.

CORPORATIONS.—IF A PROMOTER OF A RAILWAY CORPORATION AGREES WITH A THIRD PERSON to aid in procuring a *bonus* for such corporation, and the *bonus* is procured through his aid, and the corporation afterwards organizes, it does not, by accepting the *bonus*, become liable on the contract thus made by the promoter.

CORPORATIONS ARE NOT LIABLE UPON CONTRACTS MADE BEFORE THEY ARE IN EXISTENCE, and this rule is applicable under the statutes of Texas to contracts made with an attorney by a promoter for services in advising as to, and preparing, articles of incorporation.

G. A. McCall, for the plaintiff in error.

I. W. Stephens, for the defendant in error.

353 GAINES, A. J. This suit was brought by the defendant in error against the plaintiff in error to recover upon open account for services rendered. The plaintiff in the trial court obtained a judgment, which was affirmed by the court of civil appeals. This writ of error is sued out for the purpose of reversing that judgment.

The plaintiff in error, the defendant in the trial court, is a corporation, organized under the general law of the state for the purpose of constructing and operating a railroad. The defendant in error, the plaintiff in the trial court, is a practicing attorney at law. The services for which a recovery was sought were for aiding to raise a *bonus*, and for legal advice and assistance, and were rendered both before and after the filing with the secretary of state the company's articles of incorporation.

The testimony, as shown by the statement of facts, in so far as it bears upon the question before the court, is in substance as follows:

The plaintiff testified that in March, 1889, he was employed by one Anderson to assist in raising a *bonus* for the defendant company, and "agreed that the said company would pay him well for his services"; that Anderson was a promoter of the corporation, and represented himself as its general manager, and employed plaintiff not only to assist in procuring the *bonus*, but to attend to all the company's business as its attorney; that in September, 1889, Anderson allowed his account, and was at that time the owner of a majority of the stock, which he subsequently transferred to one Stone, the president of the company, and his associates.

Stone testified, on behalf of the company, that in the spring

of 1889, in Kansas City, Missouri, he employed Anderson to go to Weatherford, and to procure a *bonus* of forty thousand dollars, and survey the right of way for a railroad from that city to Mineral Wells, and to pay him one thousand dollars for his services; that he had paid Anderson according to his agreement; that he did not know that Anderson had ever employed plaintiff for any purpose; that Anderson was never general manager for the company, and held no office in it except that of director; that he knew that the plaintiff was interesting himself in procuring the *bonus*, but supposed he was working for one Johnson, who was one of the charter members, and who owned certain coal lands which he wished to sell to the projectors of the railroad; that plaintiff never said any thing to him about the company owing him any thing, and that the first he knew of plaintiff's claim was when this suit was brought.

There was further testimony tending to show that Anderson was the chief active promoter of the enterprise, and that he had the principal [353] management of the business from its inception in March until he retired in September, 1889; and that during this time the plaintiff was frequently in attendance upon him, aiding and assisting him in procuring the *bonus*, and otherwise promoting the objects of the company.

No controversy is raised in this court as to the fact of plaintiff's services, or as to their value.

The trial judge, as conclusions of fact, found, in substance, that some kind of a company was formed to build the railway from Weatherford to Mineral Wells; that Anderson was "the principal mover in said scheme, and was so recognized by all parties"; that he employed plaintiff to assist him in procuring a *bonus* and in otherwise advancing the enterprise, and that the plaintiff rendered service under said employment, both before and after the articles of the company were filed; that the *bonus* was raised, and was, after its incorporation, accepted by said company.

The court of civil appeals adopt the findings of the trial judge, and add additional findings as follows: "The charter of the defendant company was signed and acknowledged about June 1, 1889, and was filed in the office of the secretary of state at Austin, July 2, 1889. The *bonus*, or subsidy, was not secured until after the filing of the charter. The record would have justified the trial court, and so justifies us, in finding, as we do, the fact to be, that, in availing itself of the

subsidy secured, the company knew of the services of the plaintiff in raising the *bonus*."

Under the statute, the corporation came into existence when its articles of incorporation were filed in the office of secretary of state: Rev. Stats., arts. 4104, 4105. Although the trial court found that the services for which plaintiff sued were rendered in part before and in part after the filing of the articles, their value was assessed as an entirety at five hundred dollars, and judgment was rendered for the whole amount. In this there was error. We are of opinion that, under the circumstances of this case, as shown by the evidence, the defendant corporation cannot be held liable to the plaintiff for any services rendered by him before it was brought into legal existence.

Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, cannot be treated as agent, because the nominal principal is not then in existence; and hence when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced: *Kelner* v. *Baxter*, L. R. 2 Com. P. 174; *Melhado* v. *Porto Allegre etc. Ry. Co.*, L. R. 9 Com. P. 503.

354 The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment: *Kerridge* v. *Hesse*, 9 Car. & P. 200.

The statute, however, which authorizes the incorporation may provide that the corporation, when formed, shall pay the necessary expenses of promoting the scheme; in such a case, though the right of action is dependent upon the contract, the liability is created by the statute: *Re Rotherham etc. Co.*, 50 L. T., N. S., 219.

It is now held in England, that although the articles of association bind the company to pay the expenses of its promotion, a third party cannot avail himself of such a provision so as to maintain an action against the company: *Re Rotherham etc. Co.*, 50 L. T., N. S., 219; *Eley* v. *Positive etc. Assur. Co.*, 34 L. T., N. S., 190.

It is also generally held that contracts by promoters made on behalf of the corporation, within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified; but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense: *McArthur* v. *Times Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653; *Spiller* v. *Paris Skating Rink Co.*, L. R. 7 Ch. Div. 368.

With the exception of the law courts of England the rule is also very generally recognized, that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accepts its benefits, it must take it with its burdens; and if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation: *Spiller* v. *Paris Skating Rink Co.*, L. R. 7 Ch. Div. 368; *Touche* v. *Metropolitan Ry. Warehousing Co.*, L. R. 6 Ch. 671.

But as to the application of the rule last announced the courts differ in opinion. A leading case upon this subject is *Edwards* v. *Grand Junction Ry. Co.*, 1 Mylne & C. 650. There the promoters of the railway company had entered into a contract with the trustees of a turnpike company, in which the latter agreed to withdraw their opposition to an act of parliament for the incorporation of the railway company, in consideration of an agreement by the promoters to insert certain clauses in the act as to the nature of the necessary constructions at the crossing of the railway and the turnpike road, and the opposition was withdrawn, but the clauses were not inserted, and it was held that the railway company should be enjoined from constructing the crossing in a manner different from that specified in the clauses which had been agreed upon and had been omitted. The correctness of the ruling in this case was seriously questioned in the house of lords in *Preston* v. *Liverpool etc. Ry. Co.*, 5 H. L. Cas. 605, and in *Caledonian etc. Ry. Co.* v. *Helensburg*, 3 Macq. 391, 2 Jur., N. S., 695. We presume the doubt as to this case arises from the fact that the only benefit accepted [855] by the defendant company was the exercise of the powers conferred upon it by the act of parliament.

When the promoters of a railway company have agreed with a landed proprietor through whose estate the road is projected to run, to take the requisite quantity of his land at

a stipulated price, and after the corporation is formed it takes the land, it is certainly equitable that the company should be made to pay the agreed compensation; and the doctrine is recognized in many English equity cases: *Stanley* v. *Chester etc. Ry. Co.*, 3 Mylne & C. 773; *Gooday* v. *Colchester etc. Ry. Co.*, 17 Beav. 132; L. R. 15 Eq. 596; *Preston* v. *Liverpool etc. Ry. Co.*, 5 H. L. Cas. 605; L. R. 7 Eq. 124; *Edwards* v. *Grand Junction Ry. Co.*, 1 Mylne & C. 650.

The same rule has been announced also in many American cases: *Little Rock etc. R. R. Co.* v. *Perry*, 37 Ark. 164; *Paxton Cattle Co.* v. *First Nat. Bank*, 21 Neb. 621; 59 Am. Rep. 852; *Grape Sugar etc. Co.* v. *Small*, 40 Md. 395; *Bommer* v. *American etc. Manufacturing Co.*, 81 N. Y. 468; *Battelle* v. *Northwestern etc. Pavement Co.*, 37 Minn. 89; *McArthur* v. *Times Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653.

Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf a corporation should be held estopped to deny its validity.

Again, when the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract might be deemed conclusive evidence of such adoption.

But there are some cases which go a step further. *Low* v. *Connecticut etc. R. R. Co.*, 45 N. H. 370, was a case of a Vermont corporation sued in New Hampshire upon a contract made in the former state. After a charter had been granted, but before an organization had been effected, a public meeting was held to promote the enterprise, at which, it is to be presumed from the opinion, the corporators were present or were presented. A proposition was made that the plaintiff should be employed and paid to visit various towns and cities to interest capital in the projected scheme, and to solicit and procure subscriptions. The plaintiff accepted the offer and performed the services, and it was held that the corporation was liable. The court determined that the question of liability depended upon the law of Vermont, as announced in the case of *Hall* v. *Vermont etc. R. R. Co.*, 28 Vt. 401. But they were also inclined strongly to think that upon general principles the company, by accepting subscriptions which were procured

by the plaintiff, bound itself to pay for his services. They also seem to recognize the doctrine that, after a charter has been granted, a majority of the corporators have the power to make contracts necessary to perfect the organization, which may be binding [356] upon the company when formed. But they also lay stress upon the fact that the charter of the defendant corporation provided, that "the expenses of all surveys and examinations, as also of the preliminary surveys already made and making, and all manner of incidental expenses relating thereto, shall be paid by said corporation."

In *Hall* v. *Vermont etc. R. R. Co.*, 28 Vt. 401, a corporator was held entitled to recover for necessary services in organizing the company, although there was no express promise by any one that he should be paid. Unless the charter of the company provided for the payment of such expenses, this decision we think is unsupported by authority.

It is generally held, that, in the absence of such provision in the act of incorporation in case of a special charter, or in the general law, or in the articles of incorporation under a general law, no implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation, expressly or impliedly, by exercising rights under it; but otherwise it is not binding upon such corporation: *Kelmer* v. *Baxter*, L. R. 2 Com. P. 174; *Melhado* v. *Porto Allegre etc. Ry. Co.*, L. R. 9 Com. P. 503; *New York etc. R. R. Co.* v. *Ketchum*, 27 Conn. 170; *Kerridge* v. *Hesse*, 9 Car. & P. 200; *Munson* v. *Syracuse etc. R. R. Co.*, 103 N. Y. 58; *Morrison* v. *Gold Mountain etc. Mining Co.*, 52 Cal. 306; *Gent* v. *Manufacturers etc. Ins. Co.*, 107 Ill. 652; *Rockford etc. R. R. Co.* v. *Sage*, 65 Ill. 328; 16 Am. Rep. 587; *Western Screw etc. Co.* v. *Cousley*, 72 Ill. 531; *Buffington* v. *Bardon*, 80 Wis. 635. See, also, *Caledonian etc. Ry. Co.* v. *Helensburg*, 2 Macq. 391; 2 Jur., N. S., 695; *Tift* v. *Quaker City Nat. Bank*, 141 Pa. St. 550.

Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters, it takes it *cum onere*, it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well

illustrated by the facts of the present case. Here a proposition was made on behalf of the company, by its promoters, that if a *bonus* should be subscribed and paid to it, it would build its road between certain points, and would carry coal at a certain stipulated rate. By accepting the *bonus*, the company became bound to fulfill the stipulations of that contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff, that if he would assist in procuring subscribers to the *bonus*, the company would pay him for his services. This was no part of the contract the benefits of which were taken by the defendant.

The benefits of a contract are the advantages which result to either party from a performance by the other; and in like manner its burdens are such as its terms impose. A more accurate manner of stating the [357] nature of the plaintiff's demand is to say, that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true, in one sense, that the company has had the benefit of plaintiff's services, and it is equally true that it would have had that benefit if the services had been rendered under an employment by the subscribers to the *bonus;* and yet in the latter case it could not be claimed that the company would be liable for such services, unless payment for them by the company were made one of the terms of the contract between the company and the subscribers.

In re Rotherham etc. Co., 50 L. T., N. S., 219, in the opinion of one of the justices, this language is used: "It is said that Mr. Peace has an equity against the company, because the company had the benefit of his labor. What does that mean? If I order a coat and receive it I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that, because a person gets the benefit of work done by somebody else, he is liable to pay the person who did the work."

There is no doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation, or in the articles when the incorporation is effected under a general law. When such is

the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. But, in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold, with some hesitation, that claims for the necessary expenses of the organization, under our statute, should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.

Applying the rules we have announced to the case before us, it is apparent that the plaintiff has recovered, in part at least, for services for which the defendant was not bound to pay. He made his contract before the company had a legal existence as a corporation, with a single promoter; and it is a matter of no moment that the promoter was the general manager of the project, and became the owner of the majority of the stock upon its organization. There were other stockholders. The law requires that there should be ten at least: Rev. Stats., art. 4099.

The evidence does not disclose that his contract with Anderson was actually known to any other person; nor do we see any other circumstance from which knowledge should necessarily be inferred. Since Anderson [358] had no power to bind the future corporation, but could bind himself, the inference from his assisting Anderson would be that he was acting gratuitously, or that Anderson had agreed to pay him.

Anderson was interested in shifting his contract upon the company; and it may be doubted whether, although he became a director, notice to him could be deemed notice to the company. The court of civil appeals find, however, that the company had notice.

Waiving the question of the right of the court to supplement the finding of the trial judge under such evidence, and the further question whether there be any evidence to support this conclusion, it follows from what we have already said, that the question of the company's knowledge does not affect the case. The plaintiff's contract with Anderson, though made by the latter on behalf of the company, was not a lien, encumbrance, or burden upon the contract between the subscribers to the *bonus* and the defendant, and it incurred no liability on the former contract by accepting the benefit of the latter.

The evidence was sufficient to sustain a recovery by the plaintiff for the value of his services rendered after the corporation was created; but the court below failed to find separately the reasonable worth of such services. Therefore, the entire judgment must be reversed.

We deem it proper to say, in conclusion, that, if the opinion in the case of *McDonough* v. *First Nat. Bank*, 34 Tex. 309, is to be construed as holding that merely by accepting the benefit of the plaintiff's labor, the defendant ratified and became bound under the promoter's contract, it does not meet our approval. Whether the contract in that case was one which the bank had the power to ratify is, to say the least, a doubtful question; but it is one that does not concern us here, and upon which we express no opinion.

The judgments of the district court and of the court of civil appeals are reversed and the cause remanded.

CORPORATIONS—PROMOTERS, WHETHER AGENTS.—Every person acting by whatever name in the formation of a company at any period prior to its incorporation occupies a fiduciary relation towards it. He is an agent of the corporation, and subject to the disabilities of its agents: *Bosher* v. *Richmond etc. Land Co.*, 89 Va. 455; 37 Am. St. Rep. 879, and note. See the extended note to *Pittsburg Min. Co.* v. *Spooner*, 17 Am. St. Rep. 161, and the note to *Memphis etc. R. R. Co.* v. *Woods*, 16 Am. St. Rep. 98. A contract made by promoters of a projected corporation, in its name and for its benefit, must be treated as the contract of such promoters, acting either jointly as individuals or as general partners, and they may, even after organization, maintain an action for a breach of such contract: *Abbott* v. *Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193.

CORPORATIONS—RATIFICATION OF CONTRACTS OF PROMOTERS.—Contracts made by promoters of a corporation in anticipation of its organization may be ratified by it after its incorporation, and such ratification may be accomplished either expressly or by implication: *McArthur* v. *Times Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653. A corporation has power when organized to ratify a contract made by its promoters, when it is one within the purposes for which the corporation was organized: *Stanton* v. *New York etc. Ry. Co.*, 59 Conn. 272; 21 Am. St. Rep. 110, and note.

CORPORATIONS—PROMOTERS—RECOVERY FOR SERVICES.—The promoter of a corporation cannot recover for services performed for it prior to incorporation in the absence of proof that a majority of the corporators or promoters of the corporation authorized the service: *Bell's Gap R. R. Co.* v. *Christy*, 79 Pa. St. 54; 21 Am. Rep. 39.

CORPORATIONS—LIABILITY ON CONTRACTS OF PROMOTERS.—Contracts made on behalf of a corporation by its promoters before it has a legal existence do not bind the corporation, unless it adopts and ratifies them after its incorporation: *Pittsburg etc. Min. Co.* v. *Quintrell*, 91 Tenn. 693. This question is the subject of discussion in the extended notes to *Moore etc. Hardware Co.* v. *Towers Hardware Co.*, 13 Am. St. Rep. 28, and *Pittsburg Min. Co.* v. *Spooner*, 17 Am. St. Rep. 161.

WESTERN UNION TELEGRAPH COMPANY *v.* NEEL.

[86 TEXAS, 368.]

A TELEGRAPH CORPORATION HAS POWER TO MAKE REASONABLE REGULATIONS for the conduct of its business, and its customers are bound by them after they had notice of their existence.

TELEGRAPH CORPORATION—FAILURE TO DELIVER MESSAGE OUT OF BUSINESS HOURS.—A telegraph corporation has power to adopt reasonable regulations as to its business hours, and is not answerable for delay in the delivery of a message caused by its being received out of those hours. A person desiring a message delivered at an unusual hour should inquire whether it will be delivered at that time, and, in the absence of such inquiry, the telegraph corporation does not become answerable for the delay by its failure to volunteer the information that the office to which the message is addressed is not open for business until later.

Kleberg and Crain and John Lovejoy, for the appellant.

Walton, Hill, and Walton, for the appellees.

369 GAINES, A. J. "Upon the trial of the above-entitled cause in the court below it was shown that Jodie Roden, a sister of the appellee, Ella Neel, was lying at the point of death at her home near Hope, in Lavaca county; that a brother of appellee went to the town of Yoakum, where appellant had an office, about 4 o'clock in the morning of 370 July 29, 1891, and caused a telegram to be sent to Cuero to be addressed to Mrs. Neel, care of the Dromgoole Hotel, asking her to come to her sister at once. The telegram was received at Cuero about 4:50 o'clock, but was not delivered until about 10 o'clock on the same morning. Mrs. Neel set out at once to go to her sister, but Mrs. Roden had died when Mrs. Neel arrived. If the telegram had been delivered promptly when it was received at Cuero, Mrs. Neel could have reached her sister before she died.

"In defense of this suit for failure to deliver said telegram promptly the appellant pleaded and proved that its office hours at Cuero were from 7 o'clock A. M. to 7 o'clock P. M., and that the messenger did not reach the office until 7 o'clock A. M.; and there was evidence that after this hour the telegram was promptly delivered; and it alleged that the fixing of office hours was a reasonable regulation that it was permitted by law to make.

"The court charged the jury, in effect, that such regulation was proper, but that the sender of the telegram must

either know or be reasonably presumed to know of it, or informed thereof by defendant's agent.

"The defendant then requested the following instruction to the jury: 'All messages to be sent by telegraphic wire are accepted subject to the delays ordinarily incurred during transmission; and, if the jury believe from the evidence that the defendant company had reasonable office hours, during which it delivered telegraphic messages in the town of Cuero, it was not by law compelled to deliver messages outside of said hours; and such reasonable business hours were implied in the contract between the plaintiff and defendant company, if such contract has been proved, unless specially stated or understood by the parties to said contract that the services to be performed should be performed otherwise than in the usual manner and subject to the usual rules under which the company does business.'

"The instruction asked by the defendant was pertinent, because if the message had been delivered within a reasonable time after 7 o'clock the plaintiff would probably not have had time to see her sister before she died."

Upon the foregoing statement, which we have quoted from the certificate of the court of civil appeals, they submit to us the following questions:

"Believing that it has never been authoritatively settled by our supreme court that it is the duty in such case of the telegraph company to give notice to the sender of a dispatch of the office hours at the receiving office, provided they are established and reasonable, and that the message will not be delivered outside of such office hours, we certify for the decision of the supreme court, which arises on appeal to this court, whether or not, in the absence of proof of a special contract to send and deliver [371] at once, and the absence of actual notice to the sender of the regulation and office hours, the undertaking of the company was to deliver the message at once.

"Should the instruction have been given?"

We are of the opinion that, under the circumstances stated in the question, it was not the duty of the company to deliver before its office hours, and that the requested charge should have been given. A telegraph company, from the necessity of the case, must have power to make some regulations for the conduct of its business; and, when such regulations are reasonable, it is generally conceded that a party who con-

tracts with such a company for the transmission of a message is bound by them, provided he has notice of their existence. But whether or not he is bound when he has no notice is a question which is by no means settled. We concur with the court of civil appeals in holding that the question has never been authoritatively determined in this court.

Under the peculiar circumstances of the case it was held in *Western Union Tel. Co.* v. *Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, that the fact that the company's office at the delivering station was closed at the time the dispatch was transmitted did not exonerate it from liability. But the agent of the company who accepted the message for transmission testified that he knew that the purpose was to notify the person addressed of the expected arrival of the dead body of the plaintiff's wife at the railway station, and that unless it was delivered on the same evening the corpse would reach the station before the telegram. Having received the plaintiff's money, knowing his object in sending the message, and that that object could only be attained by prompt transmission and delivery to the person addressed, it could not legally urge its rules as to office hours as an excuse for not delivering the dispatch until the next day. It was properly held estopped to deny that the contract was for an immediate delivery.

In the *Bruner case*, 19 S. W. Rep. 149 (Tex., March 8, 1892), it would seem that the defense was set up that at the time the dispatch was taken for transmission the office to which it was to be sent was closed; but we think it is apparent from the opinion that the point before us was not involved. The court in their opinion say: "Appellant accepted the telegram and undertook to deliver it about 9 o'clock at night. It cannot be excused in its failure to perform the contract because its office was practically closed against Alvin, especially since it does not appear that any effort was made to send the message until next morning, when it was too late for the appellee to catch the train to Galveston."

Upon the more general question, whether a party to a contract with a telegraph company is bound by the rules and regulations of the company of which he has no notice, the authorities are not in accord.

In *Birney* v. *New York etc. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607, the court say [373] that a person delivering a message for transmission "is supposed to know that the engage-

ments of the company are controlled by those rules and regulations, and does himself in law ingraft them in his contract of bailment, and is bound by them." The doctrine is reaffirmed in *United States Tel. Co.* v. *Gildersleve*, 29 Md. 232, 96 Am. Dec. 519, but is questioned by Judge Thompson in his work on the Law of Electricity, section 212. The law of Maryland expressly provides that telegraph companies may make rules and regulations, and the opinions in the cases cited lay stress upon that fact; but it seems to us that, in the absence of a statute, the power is necessarily implied.

In *Given* v. *Western Union Tel. Co.*, 24 Fed. Rep. 119, it was held, in effect, that a telegraph company could establish reasonable office hours, and that the sender of a message was presumed to contract with reference to such a regulation, although it was not known to him at the time that he entered into the contract.

In *Western Union Tel. Co.* v. *Harding*, 103 Ind. 505, the same rule was applied in an action for the recovery of a penalty given by statute for the failure to make prompt delivery of a message; but the court expressly decline to say that it ought to apply to an ordinary suit for the recovery of damages for the breach of a contract to transmit a telegram. The court quote from the opinion of Mr. Justice Miller in *Given* v. *Western Union Tel. Co.*, 24 Fed. Rep. 119, as follows: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when any other office closes for the night. The immense number of these offices over the United States, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seems to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for the neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same state than those four thousand miles away, for the communication is between them all and of equal importance."

The Indiana court also quote as follows from the opinion in *Stevens* v. *Telegraph Co.*, 16 U. C. Q. B. 530: "Having selected that route, it may be asked, was there any obligation on part of the defendants to inform him on the 23d of November that the line was then, at the receipt of the message, out of order? I do not see that any such obligation existed. The

company was bound only to transmit as soon as it could reasonably be done. Therefore, it appears to me it is not reasonable to expect that the company is bound on any occasion to inform him that possibly the message may not be forwarded for some minutes or some hours. It is more reasonable, I think, to cast the burthen of responsibility upon the person presenting messages to be forwarded of inquiring whether they can be sent in any particular time, or of giving information [373] of the particular importance it may be to the party that the message should be forwarded without delay."

After these quotations the court say: "It may be well to state that the members of this court are not all agreed as to the validity of the reasoning contained in the foregoing opinions, and are not therefore to be deemed as committing themselves to them as authority."

In *Behm* v. *Western Union Tel. Co.*, 8 Biss. 131, Judge Gresham, in charging the jury, recognized the doctrine that reasonable regulations as to the number of servants at small stations should be considered in determining the question of diligence in the delivery of a message, and that the absence of a messenger boy at dinner might be a just excuse for delay in such delivery. But see *Western Union Tel. Co.* v. *Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148.

Such are the cases bearing immediately upon the question submitted for our determination. There are, however, some railroad cases which seem to involve a similar principle. The contract of a railroad company with a passenger is to carry him to his point of destination under the contract without unreasonable delay. Yet, it is held, that a passenger who procures a ticket has no right to demand an immediate carriage, and must wait till the departure of the regular trains: *Hurst* v. *Great Western Ry. Co.*, 19 Com B., N. S., 310; *Gordon* v. *Manchester etc. R. R. Co.*, 52 N. H. 596; 13 Am. Rep. 97. There are delays which grow out of the necessary regulation of the business, for which the carrier cannot be held reponsible. If a passenger, on the other hand, be misled by the company's time-table, and buy his ticket upon the faith of it, the company may be held liable for not carrying him according to the table. In an English case of this character the action was sustained on the ground of deceit: *Denton* v. *Great Northern Ry. Co.*, 5 El. &. B. 860.

A limit as to the number of its trains and intervals of time more or less extended are obviously indispensable to the con-

duct of the business of a railway company. So also with telegraph companies. Although not absolutely necessary, some regulations as to office hours and as to the number of employees at each office are reasonably required for the successful management of their business, both in their own interest and in that of the public in general. It may be to the interest of some individual, upon a particular occasion, or even at all times, that every office of a telegraph company should be kept open at all hours, and that the working force should be sufficient to receive and deliver a dispatch without a moment's delay. So also it may be to the interest of a very few that an office should be kept at some point on the line where an office could not be maintained in any way without a loss to the company. If in the first instance the company should be required to keep the necessary servants to keep its business going at all hours, it would result in the necessity of closing many offices or in the imposition of additional charges upon its customers in general, in order to recoup the loss incident to their being maintained. So, on the other hand, if they should be required to keep [374] offices wherever it might result to the convenience of a few persons, additional burdens upon the general public would in like manner result.

It follows, we think, that the public interest demands that these companies should have the power to establish reasonable hours within which their business is to be transacted, and that individual interests must yield. It seems to us that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract.

In the application of the principles of law to new cases we should proceed with caution, and therefore we deem it proper to say that our ruling is restricted to the question submitted. Whether the rule we have announced should be applied to other regulations by telegraph companies we leave for decision when the question may arise.

This opinion will be certified in answer to the questions submitted.

TELEGRAPH COMPANIES—POWER TO MAKE REASONABLE REGULATIONS. One who sends messages by telegraph is supposed to know that the companies' engagements are controlled by those rules and regulations which it has a right to make: *Birney* v. *New York etc. Tel. Co.*, 18 Md. 341; 81 Am.

Dec. 607, and note; *Womack* v. *Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614. See a full discussion of this subject in the extended note to *Camp* v. *Western Union Tel. Co.*, 71 Am. Dec. 465; also the note to *True* v. *International Tel. Co.*, 11 Am. Rep. 168.

CARGILL *v.* KOUNTZE.

[86 TEXAS, 386.]

A CREDITOR'S BILL TO COMPEL HIS DEBTORS TO DISCLOSE PROPERTY which they seek to have subjected to execution cannot be sustained under the statutes of Texas.

STATUTORY CONSTRUCTION.—IF A STATUTE IS RE-ENACTED after it has been construed by the courts the presumption is that the legislature intended that the new enactment should receive the same construction as the old.

Goldthwaite and Ewing and H. F. Ring, for the plaintiffs in error.

Stewart and Stewart, for the defendants in error.

386 GAINES, A. J. This suit was brought by Kountze Brothers, alleging themselves to be creditors of Cargill and Dennis, to compel the latter to make discovery of their assets.

After stating that the plaintiffs had obtained a judgment against the defendants for ten hundred and fifty-four dollars; that they had sued out executions which had been returned "no property found," and that they had caused an abstract of the judgment to be filed in the office of the clerk of the county court of Harris county, so as to secure a lien upon the real estate of defendants in that county, they proceed in their petition to make the following allegations: "And your petitioners represent, that, shortly before the recovery of said judgment against Cargill and Dennis, they, the said Cargill and Dennis, were, and for several years previous thereto had been and are now, engaged in divers money making and speculating enterprises and transactions; and your petitioners are informed and believe that, in course of such business pursuits of the said Frank Cargill and E. L. Dennis, divers persons became indebted to them to a large amount, and that the defendants, Cargill and Dennis, have, at the time of filing this, your petitioners' bill of complaint, debts due to them, and for which they hold divers securities and evidences, to a large amount, and have divers

goods, wares, and merchandise or other articles of personal property which belong to them, or in which they are in some way beneficially interested, and that they have equitable interests and things in action of some kind or nature, which might or ought to be applied to the payment of your petitioners' said judgment against them, the defendants, Cargill and Dennis.

"And your petitioners further represent that the defendants, Frank Cargill and E. L. Dennis, more especially E L. Dennis, are owners of, or in some way or manner beneficially interested in, some real estate in this or some other state or territory, or some chattels real of some name or kind, or in some contract or agreement relating to real estate, or rents or issues and profits of some real estate; and also, that the defendants are the owners of, or in some way or manner beneficially interested in, the stock of some company, incorporated, or unincorporated or in the profits of some company or copartnership; and also, that they have in their possession at the time of the filing of this your petitioners' bill of complaint, some money or bank bills; or that they have money deposited in some bank or elsewhere to their credit; or that they have money or securities for the payment of money held by some other person, in trust or otherwise, for their benefit. And if the defendants, Frank Cargill and E. L. Dennis, have made any sale or assignment of their property or effects, or any part thereof, your petitioners expressly charge that they believe that such sale, transfer, or assignment is merely colorable, and made with the view of protecting the property or effects of the defendants so assigned, and placing the same beyond the reach of your petitioners' said judgment [see] and to enable the defendants to control and enjoy the same and the avails thereof, and that it would so appear if the defendants, Frank Cargill and Edward L. Dennis, would state and set forth when and to whom such sale, transfer, or assignment was made, and what was the amount in value of the property and effects assigned, sold, or transferred, and what were the terms and conditions upon which such sale, transfer, or assignment was made, and what disposition had been made of the property or effects so sold, transferred, or assigned, and in whose possession the same is now, or what has been done with the avails thereof.

"And your petitioners claim a full discovery and complete disclosure of all such property and effects and things in

action belonging to the defendants, Cargill and Dennis; and all trusts whereby any property, debts, or other effects are held for the use and benefits of the defendants, Frank Cargill and Edward L. Dennis; and of every sale, transfer, or assignment which defendants have made of their property, debts, or other effects; and of the person or persons to whom such assignment, sale, or transfer has been made; the amount and value of the property, debts, or effects so assigned, sold, or transferred, and the trusts or other conditions upon which said sale or assignment or transfer was made; and all the facts and circumstances relating thereto; and particularly what is the situation of the property, debts, or other effects assigned or transferred at the time of the filing of this your petitioners' bill of complaint.

"And your petitioners further represent that they have reason to believe, and so charge the fact to be, that the defendants have property, debts, and other equitable interests, things in actions, or effects of the value of more than ten hundred and fifty-four dollars, interests and costs, exclusive of all prior just claims thereon, and which your petitioners have been unable to reach by execution on said judgment against said defendants, Cargill and Dennis; and that this your petitioners' bill of complaint is not exhibited by collusion with the defendants or with any other person; or for the purpose of protecting the property or effects of the defendants, Frank Cargill and Edward L. Dennis, against the claim of other creditors, but for the sole and only purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your petitioners against the defendants, Frank Cargill and Edward L. Dennis."

The petition concludes with a prayer that each of the defendants be required to disclose under oath all their assets of every description whatever, and that they also be required to answer certain special interrogatories which are set out therein.

The trial court sustained a demurrer to the petition and dismissed the suit. The plaintiff having sued out a writ of error, the court of civil appeals reversed the judgment and remanded the cause. The case came to us upon a writ of error from this court to the court of civil appeals.

[891] We are of the opinion that the district court was correct, and that the court of civil appeals erred in its ruling.

Broad expressions of eminent text-writers would seem to

sanction this proceeding. We think, however, the propositions announced by them are not supported by the cases cited, except in a restricted sense. Mr. Freeman, in enumerating "the objects which may be accomplished by proceedings in equity to obtain satisfaction of a judgment at law," says: "1. A full and complete discovery may be obtained of all the defendant's assets, and when discovered they may be compelled to contribute to the payment of the plaintiff's judgment": 2 Freeman on Executions, sec. 424. A review of the cases cited by the learned author will show that none of them can be held a precedent for a general bill of discovery like that under consideration.

The first is *Cresswell* v. *Smith*, 8 Lea, 688. Its nature is shown by the following quotation from the opinion: "The bill must therefore be regarded as filed against the defendant Smith alone, and the question is, Can it, in this view, be maintained? The question is a new one in this state, so far as I know, and merits, as I think, a very careful consideration. It will be observed that it is not a bill for the purpose merely of compelling the defendant to discover generally whether he owns property, money, or effects for the payment of his debts, in the nature of a 'fishing bill.' It is true there is a prayer that the defendant be required to discover whether he owns any property or stock or choses in action of any character; but the stating part of the bill points out specifically the property about which the discovery is specially sought, and states circumstantially the information upon which it is charged that the defendant owns the property. If the right to discovery and relief in this particular property can be maintained, then that the prayer of the bill is too broad would not be material. We think the prayer is too broad, but that part should be rejected." The opinion then proceeds to hold that the jurisdiction of the court to entertain the bill should be upheld as to the property specifically pointed out, by virtue of the authority conferred by the statute of the state.

Carter v. *Hampton*, 77 Va. 631, was a bill brought by the creditor of a decedent against the administrators and heirs, to compel a discovery of assets belonging to the estate. *Thomas* v. *Adams*, 30 Ill. 37, and *Clarke* v. *Webb*, 2 Hen. & M. 8, are cases of the same character. It is well established that such a bill may be maintained, as we shall hereafter show.

Gordon v. *Lowell*, 21 Me. 251, was a suit to set aside a fraudulent conveyance of certain property specifically described,

and to subject it to the payment of the complainant's debt.

Lore v. *Getsinger*, 7 N. J. Eq. 191, was a bill filed under the provisions of the New York statute.

[393] *Miers* v. *Zanesville etc. Co.*, 11 Ohio, 273, was a proceeding against a corporation for the discovery of assets, and specifically pointed out the assets in reference to which the discovery was sought. Among other things, it sought to subject unpaid subscriptions to the capital stock to complainant's debt, which is a well-recognized ground for equitable interference.

Cadwallader v. *Granville etc. Society*, 11 Ohio, 292, was a suit to subject the defendant's interest in a specific tract of land, upon the ground that the interest was equitable and not subject to sale under execution.

Goss v. *Lester*, 1 Wis. 43, was an action to set aside fraudulent conveyances.

Hacker v. *Robeson*, 8 R. I. 141, was a bill filed by certain creditors against the assignees of their debtor, to recover a surplus of assets in their hands, and for an account. It gives no countenance to the proceeding in the present case.

Hendricks v. *Robinson*, 2 Johns. Ch. 283, was a suit to set aside certain fraudulent conveyances specifically described. We fail to see that *Kimberly* v. *Sells*, 3 Johns. Ch. 467, also cited by Mr. Freeman, has any application whatever to the doctrine announced by him.

In *Boden* v. *Dellow*, 1 Atk. 289, the bill was filed by the assignee of a bankrupt, suspected of having concealed his assets, against himself and certain relatives, to compel a discovery. The case involved both fraud and trust, and the proceeding was probably specially authorized by statute. The report of the case is very meager.

The case of *Leroy* v. *Rogers*, 3 Paige, 234, would be authority in support of the petition in the present case were it not for the fact that at that time the statutes of New York expressly authorized the proceeding. A careful reading of the opinion will show that it involved the construction of a statute.

Mr. Pomeroy says: "Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual; as for the discovery of assets," etc: 3 Pomeroy's Equity Jurisprudence, sec. 1415. In support of this proposition some of the authorities

already reviewed are cited. The additional authorities we will now proceed to consider.

Hadden v. *Spader*, 20 Johns. 554 (same case under name of *Spader* v. *Davis*, 5 Johns. Ch. 280), was a suit by judgment creditors against their debtors and the assignee of a stock of goods alleged to have been fraudulently transferred to him by such creditors, to subject the goods or their proceeds to the payment of the judgment. A discovery was prayed, and answers having been filed, the case was discussed and determined upon the question of the right to subject the proceeds of the property to the payment of the debt.

Bay State Iron Co. v. *Goodall*, 39 N. H. 223, 75 Am. Dec. 219, was a [393] case like the present. But it is apparent from the opinion that there was a statute of the state of New Hampshire which authorized the proceeding, although the court say the remedy exists in equity without the statute. The main authority cited to support the last proposition is *Leroy* v. *Rogers*, 3 Paige, 234, which we have seen was a proceeding under the Revised Statutes of the state of New York.

In *Trego* v. *Skinner*, 42 Md. 427, the complainant, a judgment creditor, sought to subject real estate alleged to have been paid for by their debtor, and to have been conveyed to his wife, to the satisfaction of their judgment. A discovery was also prayed as to other assets fraudulently concealed by the debtor and by a firm of which he was a member. The court held that a demurrer to the bill was properly overruled. The bill was certainly good in part, and the decision of the court was correct. The expressions in the opinion show that the court were also of the opinion that the bill was good as to the discovery, but for this they cite no authority.

In Bispham's Equity, page 572, in speaking of creditors' bills, it is said: "They may also be made use of for the purpose of obtaining discovery of the debtor's property." The only case cited in support of the text is *Newman* v. *Willetts*, 52 Ill. 98, which was merely a proceeding to set aside a fraudulent conveyance of certain real estate belonging to the debtor, and to subject it to the payment of complainant's debt.

In the latest edition of Story's Commentaries on Equity Jurisprudence it is to be noted that the editor, in a note, says, "that a creditor who has exhausted his remedy at law may maintain a bill for discovery of assets and relief" 2 Story's Equity Jurisprudence, 13th ed., sec. 1493, note b; citing

Treadwell v. *Brown*, 44 N. H. 551. We have already seen that the remedy was authorized by the statutes of New Hampshire. The text of the work, so far as we have been able to see, does not lay down that doctrine; and it is a little remarkable that, if the court of chancery had authority to entertain a bill by a judgment creditor merely to discover the assets of his debtor, so important a doctrine should have escaped the scrutiny of that able and learned commentator.

Turning to the English authorities we find in Spence's Equitable Jurisprudence of the Court of Chancery a section upon the subject of "Suits in Chancery by Creditors," in which the author says: "The jurisdiction of the ecclesiastical court being, as before mentioned, defective in the case of creditors, rendered it necessary to resort to the court of chancery, which court required not only the executor or administrator to swear to his accounts, but, supplying the defects of the ecclesiastical law, allowed the creditor to contest it. The court also decreed payment of the debt, where there were assets, and which the court of chancery by its process for obtaining discovery was enabled effectually to ascertain. Suits of this description and proceedings upon them are found in the [894] calendars from the reign of Edward VI. downward. The court was necessarily resorted to in order to recover merely equitable demands, as when a creditor sought to enforce an equitable security not giving any legal title, and in which, therefore, there was no remedy at law, or when the debtor had conveyed or devised his property in special trust for the payment of his debts": 2 Spence's Equity Jurisprudence, 580.

In Adams' Equity, also, the doctrine of the right of the creditor of an estate to file a bill in the court of chancery to compel the executor or administrator to disclose the assets is distinctly recognized: Adams' Equity, 257.

But neither of these authors anywhere recognize the right of a judgment creditor to compel his debtor by a bill of discovery to make a disclosure of the property owned by him. We have been cited to no English case in which the court of chancery ever exercised such a jurisdiction, and we have found none. And it may be doubted if there be any well-considered case in the American courts in which a discovery of that character has been compelled, in the absence of a statute conferring the authority.

Every original bill in equity, according to the practice of

the court of chancery, is a bill of discovery: Story on Equity Pleadings, sec. 311. They are usually bills of discovery and relief; that is to say, they pray the court to grant some relief, and, as an aid thereto, they seek to purge the conscience of the defendant in order to establish some fact necessary to be proved as a basis for the decree.

But a bill for discovery merely does not pay a decree. It is brought in aid of a pending action at law, or of a suit at law to be brought in order to procure evidence.

Judge Story says: "The bill should set forth the particular matters to which the discovery is sought, for the other party is not bound to make answer to vague and loose surmises. On this account, when a bill of discovery was brought by an executrix, stating generally that a demand had been made upon her as executrix by the defendant, which she had refused to pay, and he had sued her therefor; and that the executrix knew nothing of the demand, of her own knowledge, but believed it to be unjust, because the defendant took no measures to liquidate it in the testator's lifetime, and did not produce any vouchers; and that she could not, without a discovery of all the facts, safely proceed to a trial at law in the suit, and prayed a discovery; it was held, that the bill was bad and a mere fishing bill, amounting only to a statement that the executrix was sued at law, and did not show for what, and therefore asked a discovery beforehand, although she had reason to conclude that the suit was upon some groundless pretense": Story's Equity Pleading, sec. 325.

The petition in the present case, although it has the semblance of great particularity, is, in effect, as general as it is possible to make it. It seems [895] to us to amount to no more than an allegation that the defendants have concealed or covered up somewhere some assets, legal or equitable, subject to be applied to the satisfaction of plaintiffs' judgment which they have been unable to discover.

The authorities we have considered indicate, to our minds, that such a proceeding was not allowable under the English equity practice. It is provided for by statute in many of our states, and many cases may be found where the jurisdiction was exercised by virtue of such statutes. Bills against executors for a discovery of assets and against assignees for account and discovery were frequently entertained in the court of chancery. These all involved a trust. In cases of fraudulent conveyances equity will extend its aid to the cred-

itor by entertaining a bill against the proper parties, which points out the property and specifies the particulars in which the fraud consists, and will, as in all other cases, grant a discovery as ancillary to the action. In this case there is no trust—there is the simple relation of debtor and creditor. The bill alleges a surmise of fraud, but specifies none.

Cronin v. *Gay*, 20 Tex. 460, was a case somewhat like this. The court, in its opinion, characterized the proceeding as anomalous, and held that the suit could have been properly dismissed without motion or demurrer. The court also say: "Our statute has prescribed a mode of discovery as auxiliary to a suit, but not as an independent remedy disconnected from a regular suit." This remark was pertinent to the question before the court, if not indispensable to its decision.

In *Love* v. *Keowne*, 58 Tex. 191, Mr. Justice Bonner says: "Although a bill of discovery, technically so called and known in equity practice, is not known to our practice, yet we have a statute which is intended to answer the same purpose. In *Cronin* v. *Gay*, 20 Tex. 460, it is decided that the statute prescribes this mode of discovery as auxiliary to a regular suit, but not as an independent remedy disconnected from such suit."

Our statutes have largely extended the legal remedies of judgment creditors, as recognized at common law. Under execution they may levy upon and sell the interest of the defendant, whether legal or equitable, in both his real and personal property. They may subject, by process of garnishment, his choses in action and his shares in incorporated companies to the satisfaction of their judgment.

But we have held that equity will not aid the writ of garnishment: *Noyes* v. *Brown*, 75 Tex. 458.

In *Price* v. *Brady*, 21 Tex. 614, it was decided that promissory notes could only be subjected to the payment of a judgment by a writ of garnishment served upon the makers; that they could not be sold under execution, and that therefore an agent holding them for collection could not be made liable by the writ of garnishment. And it seems to us the general [896] trend of our decisions is to confine creditors to their statutory remedies, and not to aid them in a court of equity, except in cases of trusts and frauds.

Our courts will, at the instance of a creditor, set aside a fraudulent conveyance of a debtor, so as to subject the property to sale under execution, and to enable the creditors to

realize at such sale a fair price. But this court has never countenanced a proceeding to make the debtor apply his assets to the payment of a judgment against him, or to compel him to disclose his assets, so that an execution may be levied or a writ of garnishment served to reach them; and we are of opinion that, in the absence of a statute conferring authority for the proceeding, it should be held that none exists. Many of the states have statutes authorizing bills of discovery in cases like the present. It is in the power of our legislature to make such a law, and it must be left to its wisdom to determine whether or not it is proper to confer this inquisitorial power upon the courts of the state.

For the reasons given, the judgment of the court of civil appeals is reversed and that of the district court is affirmed.

After a motion for a rehearing the following additional opinion was delivered by

398 GAINES, A. J. Counsel for defendants in error, in support of their motion for a rehearing in this case, have filed an able and learned argument, supported by an ampler citation of authority than was contained in their original brief. At the time the former opinion was delivered the text-books exclusively devoted to the law of "Discovery" were not at our command. This probably arose from the fact that it was thought that the rules in regard to discovery had been substituted by statutory enactment, and that the learning upon that subject had become in a measure obsolete. Since the filing of this motion we have procured the authorities necessary to enable us to make an exhaustive examination of the question, with the result that we deem it proper to modify some expressions in the former opinion without changing our disposition of the case.

In Hare on Discovery, chapter 5, section 1, page 80, it is laid down that a discovery is given only in aid of some trial. But in a succeeding section (sec. 3, p. 84) that author says: "There are some early cases which appear opposed to the rule which has been stated in the preceding sections, that a discovery will only be given to be used as evidence at a trial." The text is mainly predicated upon a case in Cary Reports, page 21, the name of which is not given, upon *Protector* v. *Lumley*, Hardw. 22, and upon *Mountfort* v. *Taylor*, 6 Ves. 788.

Protector v. *Lumley*, Hardw. 22, and the case in Cary were bills for the discovery of the goods of an attainted felon, which

had been forfeited to the crown in the one case; and for the goods of an outlaw, which had been forfeited to the commonwealth in the other. The origin and nature of [sic] that jurisdiction is explained by Reeves, in his History of English Law, as follows: "A grant was made by letters patent of goods forfeited by a person attainted; the grantee brought his bill in chancery against the person who had possession of them, for this reason, that as the king could not have an action at law for the goods of an outlaw or one attainted before they had been seized for the king's use or found by a matter of record, much less could the grantee, without having had the possession. Accordingly, it was held the subpœna was his only remedy, and the defendant was ordered to exhibit an inventory of the things the next day on pain of being committed to the Fleet": 2 Reeves' History of English Law, 602.

In *Mountfort* v. *Taylor*, 6 Ves. 788, Lord Eldon granted a discovery in aid of an *elegit;* but from the report of the case we have but little doubt in our minds.

In 1 Equity Cases Abridged, 132, the case of *Taylor* v. *Hill* is thus reported: "The plaintiff having recovered judgment against J. S. (but no writ of execution sued out), supposing some particular effects of J. S. to be in defendant's hands, brought a bill to discover them, in order to subject them to his judgment. The defendant demurs, because there is no equity to compel such a discovery, and no such bill would lie against the debtor himself, much less against a third person. My lord keeper seemed to agree it would not lie against the debtor himself, nor to have a general discovery from a third person, but only for particular things, as this bill was, and overruled the demurrer." This would seem to indicate that the court was of opinion that no bill of the character would lie except to discover property specifically described, though it admits of the construction that the demurrer may have been urged upon the ground that no execution had been sued out. We note in this connection that the bill was very similar to the petition in *Cronin* v. *Gay*, 20 Tex. 460, in which it was held expressly that bills of discovery had been abolished in this state.

These authorities seem to us to leave the matter in doubt; and there, as an original question of equity jurisdiction, we are content to leave it. We have commented upon the cases merely for the purpose of modifying our former opinion, in so far as the intimation may be drawn from it that no case can

be found in the English courts which gives color of authority to the proceeding instituted in this case.

If the courts of equity in England ever entertained bills of discovery of this character, and if the jurisdiction became incorporated into our system of jurisprudence by the adoption of the common law, we are still of opinion that it is no longer the law of this state. Neither the decisions of the English courts upon the effect of their statutes, which allow a discovery in the courts where the suits are pending, nor the decisions of the courts of other states upon similar statutes, can be taken as a guide in determining the effect of our own laws upon the subject. There is an [409] apparent conflict of authority in our state courts. Some hold merely that statutes which permit the parties to testify, or which allow interrogatories to be filed to the opposite party, do not take away the jurisdiction of courts of equity to compel a discovery: *Shotwell* v. *Smith*, 20 N. J. Eq. 79; *Elliston* v. *Hughes*, 1 Head, 225; *Russell* v. *Dickeschied*, 24 W. Va. 61; *Cannon* v. *McNab*, 48 Ala. 99; *Millsaps* v. *Pfeiffer*, 44 Miss. 805. In all of these states the separate jurisdiction of the law and equity courts is maintained. The contrary is held in Missouri, where the courts exercise both law and equity jurisdiction: *Bond* v. *Worley*, 26 Mo. 253; and in *Hurd* v. *Dutchess Co. Bank*, 1 Morris, 291; and in *Rioppelle* v. *Doellner*, 26 Mich. 102, where the jurisdictions were separate. See, also, *Heath* v. *Erie Ry. Co.*, 9 Blatchf. 316.

Not only was law and equity blended into one system of jurisprudence by our statutes at the same session of the Congress of the republic at which the common law was adopted, but at the same time a system of procedure was established, which is borrowed from the practice both of the courts of law and those of equity, as recognized at common law. Writs peculiar to courts of equity were prescribed for by statutory regulation, and at an early day provision was made by statute for the perpetuation of testimony, and for the discovery of evidence in a pending suit by simply filing interrogatories to the opposite party, the answers to which had the effect of an answer under oath to a bill in equity. At a later day it was provided as a cumulative procedure that either party to a suit could take the deposition of the adverse party.

The effect of our statutory system was passed upon in *Cronin* v. *Gay*, 20 Tex. 460, and it was held that bills of discovery were thereby abolished. This decision was doubtless well known to the able lawyers who compiled our Revised

Statutes, and yet all the provisions of the old statutes in regard to the law of evidence were incorporated in that revision without change: See Report of Commissioners, 2 Sayles' Ann. Stats., 726.

When the legislature re-enacts a statute which has been construed by the courts, the presumption is that it intended that the new enactment should receive the same construction as the old. The rule is universal, and is conclusive of the question under consideration. If, however, the question were one of first impression, we see no good reason which would impel us to a different conclusion.

The motion for a rehearing is overruled.

Creditors' bills and proceedings in equity in aid of execution are considered in the note to *Massey* v. *Gordon*, 90 Am. Dec. 288–301.

The original opinion given by the court in the principal case was remarkable in denying the power of courts of chancery, independent of statutory authority, to aid a creditor, by compelling his debtor to make a discovery of concealed assets. The judge writing the opinion frankly showed that every author who had examined the question had reached the conclusion that a bill of discovery for this purpose was within the usual remedies of courts of equity, and further that there were several American decisions which distinctly recognized the same rule as prevailing in this country, but it was sought to destroy the force of these decisions by suggesting that they were made in states whose statutory law conferred the authority in question. Even if this were true it would not be by any means conclusive against the existence of the authority independently of the statutes, for it is well known that the common or equity law upon most important topics has been made a part of the statutory law in many of the states of the union, and the existence of statutory statement of a legal principle by no means justifies the inference that it did not also exist anterior to the enactment of such statute. It must be admitted that in the American cases referred to as sustaining a bill of discovery the judges nowhere rely upon statutory law. Speaking of one of these statutes, the supreme judicial court of New Hampshire said: "We are unable to perceive that the statute enlarges in any way the remedies of parties or the powers of the court as they existed before upon the well-defined principles of equity jurisdiction"; and the same court in the same case thus states what we understand to be the general rule prevailing upon the subject. "In this proceeding the complainant is entitled to a bill of discovery of all the real estate on which he had acquired a lien by his proceedings at law, and of the nature and character of the encumbrances upon it, and of the conveyances of it; that, if fraudulent, they may be removed by a decree and the plaintiff may be entitled to reach it by an execution at law. He is also entitled to a discovery of all the property, both real and personal, now owned by the defendant, wherever it may be situated; that if within the state, it may be reached by an execution, and if elsewhere, or if such that it cannot be taken by execution, as trust funds, choses in action, stocks, etc., the defendant may be compelled by an order of court to transfer the property by a proper conveyance to a receiver, to be sold and applied to the payment of the complainant's debt. He has a right

to a full discovery from the defendant of every trust created for his benefit that the court may see whether it is one on which his creditors have any equitable claim for the satisfaction of their debt": *Bay State Iron Co.* v. *Goodall*, 39 N. H. 223; 75 Am. Dec. 219. It is true that the early cases in New York decided by Chancellor Kent, and which are much relied upon in subsequent decisions and by text-writers in this country, were cases in which the right to a discovery was not particularly contested by the defendants, but it is also true that discovery was a part of the relief necessarily sought and necessarily sustained. Thus, in *McDermutt* v. *Strong*, 4 Johns. Ch. 690, the great chancellor said: "A judgment creditor must go into equity to obtain possession of the equitable interests of his debtor, and if he has taken and exhausted all the means in his power at law, he will be entitled to the aid of this court to discover and apply the property to satisfy his execution"; and this language was quoted with approval by Woodworth, Judge, speaking for the court of errors in *Hadden* v. *Spader*, 20 Johns. 568.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY *v.* TROTT.

[86 TEXAS, 412.]

DAMAGES FOR FRIGHT cannot be recovered where there is no injury to property and no physical injury, though such fright and mental suffering therefrom resulted from the negligence of the defendant.

J. W. Terry for the appellant.

412 GAINES, A. J. The court of civil appeals for the third supreme judicial district certify the following questions for our determination:

"In the above-styled and numbered case now pending in our court the appellee claimed and received damages in the county court for alleged negligence on part of appellant company, whereby appellee's team of horses, hitched to a wagon in which he was traveling, were frightened and caused to break his wagon, and put him in fear and fright as to his own personal safety, and caused him great mental suffering, vexation, and anxiety of mind. There was evidence tending to support all of these allegations. There was no averment or proof of any physical injury to appellee. The court instructed the jury that if they found for appellee, and found that as the result of the negligence complained of he was frightened, put in fear of his personal safety, and caused mental pain or anxiety 413 they should allow him fair and reasonable compensation therefor. The evidence did not present any issue as to exemplary damages, and the jury were so instructed.

"With this explanation this court certifies to the supreme court for decisions the following questions: 1. In an action for damages based upon tortious and negligent conduct of a defendant, where the wrongful act causes damages to plaintiff's property, but no physical injury to plaintiff, is mental suffering an element of actual damages? 2. Can actual damages be recovered for mental suffering when there is no physical injury, no injury to property, nor other element of actual damages?"

We are of opinion that these questions should be answered in the negative. So far as we have been able to discover, all the cases involving the question of the right to recover for fright alone are in accordance with that holding.

In *Victorian Ry. Commrs.* v. *Coultas*, L. R. 13 App. Cas. 222, the gatekeeper at a crossing negligently permitted the plaintiff's carriage to cross the railway track, just as a train was approaching. The approach of the train was discovered by the driver of the carriage, and by an effort the passage was effected barely in time to prevent a collision. The peril was imminent, and the plaintiff, a married woman, was greatly frightened. The judicial committee of the privy council, reviewing the judgment of the supreme court of Victoria, held that there could be no recovery. They say in their opinion: "According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

"The learned counsel for respondents were unable to produce any decision of the English courts in which, upon such

facts as were proved in this case, damages were recovered. The decision of the supreme court of New York, which he referred to in support of his contention, was a [414] case of palpable injury, caused by a boy, who was frightened by defendant's violence, seeking to escape from it, and is like the case of *Snesby* v. *Lancashire etc. Ry. Co.*, 1 Q. B. Div. 42.

"It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative; and, on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

In *Ewing* v. *Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, the plaintiff, also a married woman, was frightened by reason of a car of the defendant company having been thrown "against and upon" her dwelling-house, as a result of a negligent collision of trains on defendant's track. In their opinion in the case, the supreme court of Pennsylvania say: "There was no allegation that she had received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as 'accident cases' will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for 'fright' to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge."

The court say further: "If the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: 'In determining what is the proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been seen by the wrongdoer as likely to flow from his act. Tested by this rule, we regard the injury as too remote.' We know of no well-considered case in which mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood

fairly states the rule in his note to Mayne on Damages, at page 74: 'So far as I have been able to ascertain, the force of the rule is, that the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.'" The same doctrine is announced in terms equally emphatic in *Wyman* v. *Leavitt*, 71 Me. 227; 36 Am. Rep. 303.

[415] So in *Atchison etc. R. R. Co.* v. *McGinnis*, 46 Kan. 109, the court say: "The jury found that the plaintiff below was damaged sixty-five dollars by reason of peril and fright. Damages of this kind are too remote. A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he has been placed in a perilous position. Nor is mere fright the subject of damages." The same general principles are recognized in the following cases: *Canning* v. *Williamstown*, 1 Cush. 451; *Johnson* v. *Wells*, 6 Nev. 224; 3 Am. Rep. 245; *Indianapolis etc. R. R. Co.* v. *Stables*, 62 Ill. 313; *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Joch* v. *Dankwardt*, 85 Ill. 331.

Our conclusion is based upon the principles announced in the cases from which we have quoted.

DAMAGES FOR FRIGHT.—Mere fright or mental agony caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, though it produces permanent injury to the nervous system: *Ewing* v. *Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40; 30 Am. St. Rep. 709, and note. In an action for damages to real estate by blasting, the mental anxiety of the plaintiff for the personal safety of himself and family is not a proper element of damages: *Wyman* v. *Leavitt*, 71 Me. 227; 36 Am. Rep. 303, and note. In an action for injury by the bite of a dog, the fear and solicitude as to poison are proper elements of damage: *Godeau* v. *Blood*, 52 Vt. 251; 36 Am. Rep. 751, and note. See, also, the note to *West* v. *Western Union Tel. Co.*, 7 Am. St. Rep. 536.

INTERNATIONAL BUILDING AND LOAN ASSOCIATION v. HARDY.

[86 TEXAS, 610.]

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.—A CONTRACT IN WHICH A CREDITOR STIPULATES FOR A SPECIFIC REMEDY, whereby he may enforce a pecuniary obligation without resort to the courts, cannot be modified by subsequent legislation requiring him to pursue a different remedy. Hence, if a trust deed declares that on default in the payment of the obligation or demand secured by it, the creditor may sell the property at a designated place, and after giving the notice described in the deed, a statute subsequently enacted prescribing the mode of sale under all trust deeds is inapplicable, and a sale may lawfully be made by complying with the directions of the deed, though the directions of the statute are thereby disregarded.

B. L. Aycock, for the appellant.

611 STAYTON, C. J. The question certified and accompanying statement are:

"Plaintiff claims title to land in Bexar county under a deed of trust executed by appellee and wife on April 18, 1885, the sale by the trustee having taken place on October 9, 1890, in Bexar county, appellant being the purchaser. The trustee's deed was objected to when offered in evidence on one ground only, viz., 'because there was no evidence that advertisement was made by posting notices of the time and place of sale as in sheriff's sales, in three public places in the county, one of which being the court house door,' which objection was sustained."

Question: "Did the act of March 21, 1889, entitled 'An act to prescribe the place and time of sale of all real estate thereafter to be sold under power conferred by any deed of trust or other lien,' have the effect of requiring compliance with its provisions in cases of sales thereafter made under a power, where the contract conferring the power had been executed prior to said act, and provided differently in respect to the sale?"

The act referred to requires such sales "to be made in the county in which such real estate is situated. Notice shall be given as now required in judicial sales, and such sales shall be made at public vendue between the hours of 10 o'clock A. M. and 4 o'clock P. M. of the first Tuesday in any month."

The purpose of that act evidently was to make the law regulating time and place of sale under execution or other judicial process applicable to sales under powers conferred in

mortgages, and to require notice of such sales to be given in the mode and for the period prescribed for notice of sales under judicial process.

The law in force when the contract was made, as at the time when the sale under the trust deed was made, required that "the time and place of making sale of real estate, in execution, shall be publicly advertised by the officer for at least twenty days successively next before the day of sale, by posting up written or printed notice thereof at three public places in the county, one of which shall be at the door of the court house of the county": Sayles' Civ. Stats., art. 2309.

The statute, however, gave a defendant the right, upon written request, to have notice of sale given by publication in some newspaper, if there was one published in the county, provided this could be had for the compensation fixed by the statute; and such publication was required for three consecutive weeks: Sayles' Civ. Stats., art. 2309 *a*.

[612] The act of March 21, 1889, in terms applies to "all sales of real estate which may hereafter be made in this state under powers conferred by any deed of trust or other contract lien," and there can be no reasonable doubt of the intent of the legislature to make it apply to sales under contracts made before its passage, as well as to those afterwards made; and the question arises whether such legislation is in violation of any part of the constitution of the United States or of this state. If not, effect must be given to it in all cases coming within its terms.

The constitution of the United States and the constitution of this state deny to the legislature of this state power to enact any law impairing the obligation of contract, and the latter withholds power to enact retroactive laws.

The purpose of the parties in making the mortgage contract, and in giving power to sell the mortgaged property in accordance with the terms of the instrument, were twofold.

The leading purpose of that contract was to give lien on the property described in it, to secure debt due or to become due from one party to the other; and, if the contract had gone no further than to secure this right, there is no doubt that it would have been within the power of the legislature to change the remedy then existing for the enforcement of such a right through the courts, in any respect that did not essentially affect the right secured.

Notice for a longer period before sale, or notice to be given

in some manner other than that described by law in force when the contract was made, might have been required, or the time and place of sale might have been changed, without violating the right of either party under the contract; for when parties contract with reference to the enforcement of rights through the courts, if this becomes necessary, they must be understood to contract in view of the fact that the state has power to establish courts, to fix their jurisdiction, and also to regulate procedure, and that this cannot be controlled by contracts persons may make.

The contract, however, had in view, and by its terms gave and was intended to give to the creditor, a remedy through which it might enforce its right against the mortgaged property without resort to the ordinary remedies given by law; and it will now be assumed that the contract which gave that remedy was valid when made.

The constitutional provisions which forbid legislation the effect of which would be to impair the obligation of contracts affecting property or pecuniary rights, are broad and embrace every such contract; and on the case stated the question arises, Is a contract securing to a creditor right to a specific remedy, whereby he may enforce a pecuniary obligation without resort to the courts of the country, subject to such modifications and changes as may lawfully be made in the ordinary remedies prescribed by law?

[612] We are of opinion that this should be answered in the negative; for, as before said, the contract in the one case secures the right of the parties as to the subject matter of contract, but looks for remedy to laws existing or to such laws as may be subsequently enacted—in fact, contract with reference to the known power of the law-making department to make such changes in remedial laws as may be deemed beneficial, provided they be not such as impair the obligation of contracts; while in the other the very purpose of so much of the contract as secures a remedy the law does not give is to secure the specific remedy contracted for.

In one case the specific remedy is the subject of contract, and parties, one or both, thus secure it because deemed more advantageous in enforcement of right than the remedies provided by law; while in the other the thing or right secured by contract is that which gives right to some remedy for enforcement of contractual obligation; by reason of the right the remedy operates upon persons or things, and, in the

absence of contract for remedy in such cases, parties subject themselves and property to such remedies as exist at the time the contract is made, and to such as subsequently may lawfully be given by law.

That persons may contract for a remedy, lawful in itself, but not given by law for enforcement of a right, will not be questioned; but such a contract will not prevent resort to any remedy given by law.

If, however, a party desires to resort to a remedy existing only by contract, he must take it in accordance with the agreement that gives it; for the legislature has no power by subsequent law to change the contract. The exercise of such a power would be, in effect, to make contracts for parties, which the legislature has no power to do.

While this is true, there is no doubt that parties may contract with reference to an existing law affecting the remedy; but if the contract relates only to process and the manner of its execution, and not to something on which the process is to act, or like substantial thing, then the contract ought not to be held to affect the power of the legislature to change the remedy.

It has been held that a change in the law in such cases, if given effect, would not necessarily impair the obligation of contract.

A statute in New York authorized sales of mortgaged property under a power conferred by the mortgage, upon notice being given for twenty-four weeks; and while that law was in force a mortgage was executed which authorized a sale under a power "according to law"; but before the sale the law was so changed as to authorize such sales to be made on notice given for twelve weeks.

A sale made under the last law was held to be valid, on the ground that the words "according to law" meant in compliance with the law in force when the sale became necessary: *James* v. *Stull*, 9 Barb. 482.

It was, however, held that the sale was valid, if such was not the true [614] construction of the contract, on the ground that the legislature had power to change the remedy, and that such a change as was made did not impair the obligation of the contract.

In support of the last proposition, quoting from *Bronson* v. *Kinzie*, 1 How. 311, it was said: "If the laws of the state had done nothing more than change the remedy upon contracts

of this description, they would be liable to no constitutional objection. For undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts, as well as future."

Under the construction given to the contract, the decision may not be subject to objection; for it seems reasonable, when parties do not expressly fix the terms on which such powers may be exercised, but agree that the act to be done in the future may be done according to the law governing that subject, that they consent to be governed by the law in force when, under the terms of the contract, it may become necessary to exercise the power. They contract with the knowledge that the legislature may change the remedy, and ought not to be presumed to have intended, in case of such change, that the contract should become inoperative.

It seems to us that the decision in *Bronson* v. *Kinzie*, 1 How. 311, does not give support to the ruling it was cited to sustain.

In that case it appears that a mortgagor executed a mortgage which authorized the mortgagee to take possession of and sell the mortgaged property, and title to convey to the purchaser, on default of payment of principal or interest; but instead of pursuing that remedy, as he might lawfully have done, he brought a suit to foreclose. It was contended that, under a law passed subsequently to the execution of the mortgage, the property could not be sold unless it brought two-thirds of its appraised value, and that it should be sold subject to the mortgagor's right to redeem within twelve months. The law in force when the mortgage was executed, as well as the contract, gave right to make sale absolute, and without reference to appraisement. The court simply held that to give effect to the subsequent law would impair the obligation of the contract.

The case of *Conkey* v. *Hart*, 14 N. Y. 22, is frequently cited as authority for the proposition that the legislature may pass laws which will annul right to remedy given by express contract. In that case Wardell had given a chattel mortgage, which provided that he should remain in possession of the mortgaged property, "unless he or some other person or persons shall attempt to sell, secrete, remove, or otherwise dispose of the said chattels in any way whatever; then, or in such case, it shall and may be lawful for the parties of the second part, their heirs, etc., to take immediate possession of said chattels.

and keep the same until default be made as aforesaid, and then to sell and dispose thereof."

Subsequently, Wardell leased land from Simpson, and the contract provided that if Wardell "shall fail to pay said rent, or any part thereof, [615] when it becomes due, it is agreed that the said party of the first part may distrain or sue for the same, and re-enter said premises, or resort to any other legal remedy; and, in case of distress for nonpayment under this lease, the said party of the second part hereby consents and agrees that any property upon said premises, not excepting such articles as are by law exempt from distress, may be taken to satisfy the rent in arrear."

Wardell having failed to pay rent due, Simpson sued out a distress warrant, under which he caused the mortgaged property to be seized by the sheriff, whereupon the mortgagor brought replevin against him.

After the mortgage and lease were executed, a law was passed which abolished distress for rent, and the contract for remedy by distress was relied upon to defeat the action of replevin.

While recognizing the fact that the waiver of exemption was the substantial matter the parties had in view in making the contract the court held that the subsequent law took away the remedy of distress which the lessee contracted might be used.

The lease contract gave right to no remedy which would not have existed without it; and it may be true that it might properly have been held that the parties only intended that all such remedies as were lawful at time of default might be used.

The remedy contracted for was not one that could exist by contract. It could only exist by reason of a law, and it is clear that no person, by contract or otherwise, can prevent the law-making power from repealing the law which permits the use of given process, while it would not have power to deny remedy for the full enforcement of obligation imposed by contract.

It is obviously true that such remedies as rest on contract alone must be exercised as provided by the contract, or not at all; and it is equally clear that the legislature has no power to change such a contract, and in its changed condition to make it obligatory on either party, simply because it has no power to make contracts for parties.

In a case in which a trustee in a mortgage, which gave

power to sell the mortgaged property in manner and on terms prescribed by the instrument, was sought to be enjoined by the debtor on account of legislation subsequent to the contract, it was aptly said: "The deed established all the agencies for the execution of the trust. Unlike a mortgage, it contemplated no day in court for foreclosure or redemption, nor sale under the direction and terms of the court, and by its officers. But its design was to avoid the processes of the law, and to confide to impartial agents summary means of realizing the objects of the trust. Had the parties, by the nature of their agreement, as in case of mortgage, been thrown upon the courts for redress, they might have been amenable to the control which the legislature possesses over judicial remedies. Shall it be said that a sale is a remedy that may be likened to legal process, and [616] as such liable to be changed and modified by the legislature? If so, there is at least this material difference, that it is a remedy of the parties' own appointment, and the very essence of his contract. It cannot be segregated from it and treated as an extrinsic remedy within the pale of legislative jurisdiction. To admit a subsequent act of the legislature thus to modify and essentially vary the written stipulations of the parties would concede to the legislature a power to make a new contract and destroy the old altogether—a power not assumed by the letter of the act itself, for it only professes to operate on general remedies": *Taylor* v. *Stearns*, 18 Gratt. 244.

The rule is well stated by the supreme court of Pennsylvania: "But a statute strictly remedial may impair the obligation of a contract, and when this happens the act is unconstitutional: *Bronson* v. *Kinzie*, 1 How. 322. This always happens where the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone. Stay laws, exemption laws, and limitation laws are ordinarily constitutional, although applied to existing and prior contracts; but the cases in which such laws have been sustained have been cases in which the parties have not contracted about the subject matter to which the laws were applicable. If the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by

a particular contract, it is plain that, as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract": *Billmeyer* v. *Evans*, 40 Pa. St. 327. To the same effect are the following decisions: *Breitenbach* v. *Bush*, 44 Pa. St. 318; 84 Am. Dec. 442; *Lewis* v. *Lewis*, 47 Pa. St. 127; *Pool* v. *Young*, 7 T. B. Mon. 588; *Boice* v. *Boice*, 27 Minn. 373; *O'Brien* v. *Krenz*, 36 Minn. 138.

It appears that, under the contract, notice of sale was required to be given by advertisement in a daily paper of the city for ten days prior to sale day, and in entering into that contract the parties must be supposed to have determined for themselves that such notice would be more beneficial to them than notice given in some other manner.

They were equally interested in that matter, and it is certainly true that power had not been given to make the sale under any other mode of advertisement. What notice of the sale should be given was matter of contract.

Had the legislature jurisdiction to declare that the power to sell should exist, and might be exercised if notice of sale was given in some other manner than that prescribed by the contract?

While the legislature has power to prescribe what process shall be used for enforcement of rights through the courts, and what notice of judicial sales shall be given, it certainly has no power to confer on any private [617] person power to sell the property of another at such time and place and on such notice as it may prescribe, without regard to or in violation of any contract parties may have made.

If the law requiring notice to be given, as in sales under execution, is to operate on contracts made before its enactment, this necessarily annuls the power based solely on contract; for neither of the parties agreed that the power might be exercised at all, unless notice was given as the contract required.

The contract only permitting the power to be exercised on terms prescribed impliedly forbade the trustee to sell unless notice was given as it required; and, if the subsequent law is to have effect, the power to sell under its terms is a power existing only by force of the law, for the parties did not confer it.

The necessary effect of the law, when the period for advertisement prescribed by the law differed from that required by contract, would be to extend or shorten the period after de-

fault within which a sale could be made; and by reason of the fact that the statute prescribes a day in each month on which such sales shall be made, this period may be extended for a longer time than the difference in time of advertisement prescribed by contract and the law.

When parties, looking to all the facts bearing on their respective interests, make a contract whereby specific remedy, not given by law, is secured for enforcement of rights, courts ought not to inquire as to the extent of injury which may result if a law subsequently enacted, and affecting the remedy, be given effect; for such legislation impairs the obligation of contract, takes away vested rights, and is therefore prohibited by the constitution.

The act of March 21, 1889, cannot be given effect as to contracts executed before it was operative in cases in which the remedy therein prescribed differs from the remedy prescribed by contract.

STATUTES IMPAIRING THE OBLIGATION OF CONTRACT, WHAT ARE, AND THE CONSTITUTIONALITY OF: See *People* v. *Common Council*, 140 N. Y. 300; 37 Am. St. Rep. 563, and note, with the cases collected.

CAMPBELL *v.* COOK.

[86 TEXAS, 630.]

MASTER AND SERVANT.—A SERVANT MAY RECOVER DAMAGES FOR THE NEGLIGENCE OF HIS FELLOW-SERVANT if the latter was unskilled and incompetent to discharge his duties, and this was known to the master or could have been known to him by due care, and was not known to the injured servant.

PLEADING—DAMAGES, GENERAL ALLEGATION OF.—A general allegation of damages lets in evidence of such damages only as naturally or necessarily resulted from the wrongs charged. Hence, where an injury is stated to consist of the breaking and crushing of the bones of the plaintiff's hip and thigh, bruising, wounding, and injuring his back, bowels, hips, legs, and other parts and members of his body, and that from such injuries plaintiff had suffered great pain, lost the use of his leg, and been incapacitated from labor and earning money, he is not, though married, entitled to recover damages for the impairment of his capacity for sexual intercourse.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS.—A statute respecting railway corporations, defining what employees shall be deemed vice-principals and what fellow-servants, does not, because it is applicable only to railway corporations, deny them the equal protection of the laws if all persons brought within its influence are treated alike under the same circumstances.

CONSTITUTIONAL LAW.—A STATUTE DEFINING WHAT EMPLOYEES OF RAILROAD COMPANIES shall be deemed vice-principals and what fellow-servants does not deny to such corporations the equal protection of the law, and is not unconstitutional.

CONSTITUTIONAL LAW.—IF THE TITLE OF AN ACT DECLARES THAT IT IS "An act to define who are fellow-servants and who are not fellow-servants," such title does not contain two subjects.

STATUTORY CONSTRUCTION CANNOT AUTHORIZE THE EXTENSION OF THE STATUTE to a case clearly not within its provisions. Therefore, a statute declaring that certain persons in the employ of railway corporations shall be deemed vice-principals and certain other persons fellow-servants is not applicable to persons employed by a receiver of such a corporation.

MASTER AND SERVANT.—A CONDUCTOR AND A BRAKEMAN on the same train are fellow-servants.

John M. Duncan, for the plaintiffs in error.

W. S. Holliday and S. A. McMeans, for the defendant in error.

[631] BROWN, A. J. J. M. Cook sued T. M. Campbell, then receiver of the International and Great Northern Railroad Company, alleging that on the tenth day of November, 1891, plaintiff was in the employ of the said receiver as a brakeman; that it was a part of his duty to uncouple and couple cars, and to remove coupling-pins when necessary for that purpose. That I. McNeill was also in the employ of the receiver as conductor of the train on which plaintiff was working, and that said McNeill had the control and direction of the plaintiff and the said crew, whose duty it was to obey his orders. Petition proceeds to set out the management of the cars on that occasion which brought about the injury complained of, and that when injured he was in the discharge of the duty assigned to him by the conductor, and in obedience to his orders. Facts [632] are alleged showing that the conductor was negligent, and that the injury was the result of his negligence.

The injuries received are alleged as follows: "Breaking and crushing the bones of his hip and thigh; tearing, cutting, and lacerating his flesh; bruising, wounding, and injuring him in his back, bowels, hips, legs, and in other parts and members of his body." Plaintiff alleged that from the said injuries he had suffered and would continue to suffer great mental anguish and physical pain; that the injuries are permanent, destroyed the use of one leg, and that his capacity to labor and earn money is almost entirely destroyed.

The petition also alleged that the conductor in charge of the train was unskilled, unfit, and incompetent to discharge the duties of conductor, which was known to the defendant, or could have been known by due care, and was not known to the plaintiff.

The amended petition, upon which the parties went to trial, alleged that the receiver had been discharged and the property returned to the corporation, the International and Great Northern Railway Company, which is made party defendant.

The receiver filed a general demurrer, general denial, and special answer, setting up that plaintiff's injuries were caused by the negligence of a fellow-servant. The railway company adopted the answer of the receiver, repeating the special answer.

The court overruled the demurrer, and, upon trial before a jury, judgment was given for plaintiff, from which appeal was taken, and it was affirmed by the court of civil appeals.

The court did not err in overruling the demurrer, because the petition alleged that the conductor was incompetent to discharge the duties to which he was assigned, and that the defendant knew the fact, or might have known it by due care and diligence, and that plaintiff did not know of such incompetency. This was good on general demurrer, and although the other allegations might show the conductor to be a fellow-servant, defendant would be liable if guilty of negligence in employing an incompetent person for such a place, whose negligence caused the injury.

At the trial the court permitted the plaintiff, over the defendant's objections, to testify that "his capacity to have sexual intercourse with his wife was greatly impaired"; to which the defendant objected "because there was no allegation in the petition which would authorize the admission of such evidence, and because the petition does not claim such damages." It is well settled in this state that a general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrongs charged; but to admit proof of damages which do not necessarily result from the injury alleged, the petition must set up the particular effects claimed to have followed the injury: *Texas & Pac. Ry. Co.* v. *Curry*, 64 Tex. 87. The object of pleading is to notify the opposite [633] party of what it is expected to prove on the trial. In this case there was no injury alleged to have been inflicted upon any organ or member of the body

from which such "impairment" would naturally, not to say necessarily, follow. The court erred in admitting the evidence.

The judge of the district court charged the jury, in substance, that if the conductor of the train on which the plaintiff was employed as brakeman was by the defendant intrusted with the direction and control of plaintiff in the discharge of his duties as brakeman, and if plaintiff's injuries were caused by the negligence of the conductor while engaged as such, plaintiff could recover from the defendants for such injuries. The defendants asked the court to charge the jury to the contrary of this proposition, which was refused. The giving of the charges by the court and refusing those asked by defendants are assigned as error.

On the tenth day of March, 1891, the legislature passed the following act:

"AN ACT TO DEFINE WHO ARE FELLOW-SERVANTS AND WHO ARE NOT FELLOW-SERVANTS.

"SECTION 1. Be it enacted by the legislature of the state of Texas: That all persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice-principals of such corporations, and are not fellow-servants with such employee.

"SEC. 2. That all persons who are engaged in the common service of such railway corporation, and who while so engaged are working together at the same time and place to a common purpose, of same grade, neither of such persons being intrusted by such corporation with any superintendence or control over their fellow-employees, are fellow-servants with each other; provided, that nothing herein contained shall be so construed as to make employees of such corporations fellow-servants with other employees of such corporations engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants."

The third section is not material to the decision of this case.

The plaintiff in error claims that this act is void, because: 1. It deprives railroad companies of the equal protection of

the laws, in this, that it does not apply to all other common carriers, and is therefore in conflict with section 1 of the fourteenth amendment to the constitution of the United States; 2. That it contains more than one subject, and is therefore violative of section 35 of the third article of the constitution of this state.

[884] This law applies equally to each and every railroad doing business in the state, and in no respect does it discriminate against any particular railroad company. "When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions": *Missouri Pac. Ry. Co.* v. *Mackey*, 127 U. S. 209; *Pembina Min. Co.* v. *Pennsylvania*, 125 U. S. 189; *Pacific Express Co.* v. *Seibert*, 142 U. S. 353; *Charlotte etc. R. R. Co.* v. *Gibbes*, 142 U. S. 391; *New York* v. *Squire*, 145 U. S. 175.

In *Missouri Pac. Ry. Co.* v. *Mackey*, 127 U. S. 209, the court had under consideration a law upon the same subject and under like objections as in this. In Kansas a law was enacted which made all railroad companies liable for injuries received by an employee through the negligence of a fellow-servant. The law applied to none but railroad corporations. The supreme court of the United States sustained the law, and said: "The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the fourteenth amendment." The objection applied to the act of our legislature is not better framed than in that case, and is without merit.

The second objection to the law is less tenable than the first. There is but one subject embraced in the law, which is in the title expressed in the affirmative and negative form. To define who are fellow-servants necessarily defines who are not fellow-servants, and there is no soundness in the proposition that this act contains two subjects in its title or in its provisions. The word "subjects," as used in the constitution, is not synonymous with "provisions": *Tadlock* v. *Eccles*, 20 Tex. 793; 73 Am. Dec. 213.

The last and most important question is, Does the language of the act include receivers of railway companies? It is clear

that the words "railway corporations" do not mean "receivers of railway corporations." How, then, is the construction to be arrived at that will embrace such receivers in the provisions of the act? Grant that the legislature intended to embrace receivers, but failed to use apt words to express that intention. Can the court import into the statute a case omitted from it by the legislature, even by accident? How can the court determine that it was not intentionally omitted?

In Sutherland on Statutory Construction, section 430, it is said: "Liberal construction is given to suppress the mischief and advance the remedy. For this purpose, as has already been said, it is a settled rule to extend the remedy as far as the words will admit, that every thing may be done in virtue of the statute in advancement of the remedy that can be done consistent with any construction. Where its words are plain, and clearly define its scope and limit, construction cannot extend it; or [635] where the language is so explicit as to exclude any reasonable inference that such extension was intended."

Lord Brougham said: "If we depart from the plain and obvious meaning, we do not construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it."

In *Turner* v. *Cross*, 83 Tex. 224, Chief Justice Stayton expressed the same rule in this clear and forcible language: "It is the duty of a court to administer the law as it is written, and not to make the law; and however harsh a statute may be, or whatever may seem to be its omissions, courts cannot on such considerations by construction restrain its operations, or make it apply to cases to which it does not apply, without assuming functions that pertain solely to the legislative department of the government."

It is unnecessary to multiply authorities upon this question. The law is valid, is expressed in plain words, and must be taken and enforced by the courts according to its terms. The legislature has since amended it, but that does not affect it as applicable to this case.

In the two sections of the statute quoted above the employer whose liability is enlarged is mentioned eight different times, in various connections, and each time the language used is "railway corporations" or "such corporations," referring to railway corporations, as used before. In no part of the act is there a word which indicates that any other than railway

corporations were intended. This language cannot be so changed as to embrace an officer of the court, who is in no sense a corporation, because the reasons for the law apply equally to both. To supply the word "receiver" in one place would not answer the purpose, if that were allowable, which it is not; but it must be supplied in eight different places, and with reference to the various conditions in which the employer is related to the employee.

Counsel refer to *Holy Trinity Church* v. *United States*, 143 U. S. 465, to support the construction contended for; but in that case the words "labor" and "service" were used, which in its broadest sense would include the services of a rector. The court there determined that Congress did not use the words in this sense, and gave to them the meaning commonly applied, which was consistent with the recognized rules of construction.

The district court erred in its instructions given to the jury and in refusing those asked by defendant.

Defendant in error claims that because the conductor had superintendence and control over the brakeman he was not a fellow-servant, independent of the statute. It is not alleged in the petition, nor found as a fact, that the conductor had authority to employ and discharge brakemen. According to the rules laid down in the decisions of this court the case plaintiff and the conductor upon the same train were fellow-servants in the state of facts set up in plaintiff's petition.

The judgments of the district court and the court of civil appeals are reversed, and this case is remanded to the district court for further proceeding herein.

MASTER AND SERVANT — FELLOW-SERVANTS — MASTER'S LIABILITY FOR NEGLIGENCE OF.—A master is liable to a servant for injuries caused by the negligence of an incompetent fellow-servant who was knowingly or negligently employed by the master: *Cayzer* v. *Taylor*, 10 Gray, 274; 69 Am. Dec. 317, and note; *Gilman* v. *Eastern R. R. Co.*, 13 Allen, 433; 90 Am. Dec. 210, and note; *Chicago etc. Ry. Co.* v. *Harney*, 28 Ind. 28; 92 Am. Dec. 282, and note; *Frazier* v. *Pennsylvania R. R. Co.*, 38 Pa. St. 104; 80 Am. Dec. 467, and note; *Blake* v. *Maine etc. R. R. Co.*, 70 Me. 60; 35 Am. Rep. 297, and note; *Moss* v. *Pacific R. R.*, 49 Mo. 167; 8 Am. Rep. 126; *Lake Shore etc. Ry. Co.* v. *Stupak*, 123 Ind. 210; *Monahan* v. *City of Worcester*, 150 Mass. 439; *Kean* v. *Detroit Copper etc. Mills*, 66 Mich. 277; 11 Am. St. Rep. 492; *McMaster* v. *Illinois Cent. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653; *Evansville etc. R. R. Co.* v. *Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458. An employer is not liable for the negligence of co-employees, in the absence of proof that the latter are incompetent, in such sense as to charge the employer

with the results of their negligence: *Peterson* v. *Chicago etc. Ry. Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and note.

RAILROADS—CONDUCTOR AND BRAKEMAN, WHETHER FELLOW-SERVANTS. A conductor, in charge of a railroad train, and a brakeman engaged thereon, are not fellow-servants: *Mason* v. *Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814, and note, with the cases collected.

STATUTES—SPECIAL LAWS.—A public local law, which operates uniformly and subjects all persons who come within the defined locality to its provisions, is valid: *State* v. *Moore*, 104 N. C. 714; 17 Am. St. Rep. 696. Laws public in their objects may be confined to a particular class of persons if they be general in their application to the class to which they apply: *Allen* v. *Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707, and note.

STATUTES. — TITLE EMBRACING MORE THAN ONE SUBJECT: See the extended notes to *Davis* v. *State*, 61 Am. Dec. 337, and *Neuendorf* v. *Duryea*, 25 Am. Rep. 245.

CASES

IN THE

SUPREME COURT

OF

WASHINGTON.

IN RE WILBUR'S ESTATE.

[3 WASHINGTON, 35.]

A MARRIAGE PROHIBITED BY STATUTE is invalid, though contracted in a place where the statute is not in force, if the contracting parties went beyond their domicile to contract their marriage for the purpose of avoiding the prohibition.

A MARRIAGE BETWEEN A WHITE MAN AND AN INDIAN WOMAN, if prohibited by the law of the state or territory, is void, though she was at the time a member of a tribe living with her people upon a reservation set apart for them, and the marriage was contracted in the form proper for a valid marriage had both the parties thereto been Indians.

MARRIAGE, REPEAL OF STATUTE PROHIBITING.—Though a statute prohibiting a marriage between an Indian and a white person is repealed after such a marriage has been contracted it remains unlawful and invalid, and there is no presumption of a subsequent marriage arising from the fact that the parties continued their cohabitation for several years after such repeal.

ESTATES OF DECEDENTS.—IF A COURT ACQUIRES JURISDICTION of an estate by a petition for letters of administration thereon, and the petitioner is found not to be entitled to such letters, the court will proceed to grant letters to some competent person, and to settle the estate, though the heirs of the decedent protest against such grant and object to any administration at all.

Million and Houser, for the appellant.

Sinclair and Smith, for the respondent.

[35] STILES, J. The disposition of this appeal depends upon whether there was a marriage between the deceased, John T. Wilbur, and a Swinomish Indian woman, "Kitty," who, with her sons by said John T., proposes the respondent as administrator of the estate. Appellant claims administration for

herself, if any be granted, as the only lawful wife of the deceased.

[36] In 1867 the Swinomish tribe were treaty Indians, residing upon the reservation set apart for them on Fidalgo island, Skagit county, by a treaty ratified by the United States senate, and proclaimed by the president in 1859: Abbott's Real Property Statute, 1123. Kitty, then about thirteen years of age, lived with her parents on the reservation, and Wilbur, who had been a resident of the territory for some time, lived on government land which he had taken up at a few miles distance therefrom. At that time there were almost no white women in the country, and many of the men had Indian women living with them. Wilbur became desirous of having the company of a "klootchman," and selected Kitty for that purpose, and made such arrangements with her father and the authorities of the tribe that she left the reservation and went to his place, and there lived with him for about nine years. She then left him, probably at his suggestion, and returned to the reservation, and he soon after married the appellant.

It is not contended that the relations which existed between this man and woman were preceded by any statutory marriage, or that they were attended by any such circumstances as would have amounted to a common-law marriage had such an institution been recognized here. They lived together and had children born to them, and that was all. But it is very strenuously urged, and the court below so found, that there was a binding marriage ceremony between them upon the reservation, according to the customs of the Swinomish tribe, and without entering into details, which amounted to little or nothing beyond the payment of a certain sum of money to the girl's father, and his directing her to go with the white man, we think it may be conceded that all of the requirements necessary to constitute a valid Swinomish marriage were complied with, and that in the eye of the Swinomish law these two persons would have been considered man and wife. Had they both [37] been Indians such would undoubtedly have been the case, and the general holdings of the courts would have recognized the relation: *Kobogum* v. *Jackson Iron Co.*, 76 Mich. 498.

Marriages of this kind have been upheld when they existed between a white man and an Indian woman: *Johnson* v. *Johnson*, 30 Mo. 72; see notes in 77 Am. Dec. 606; *Wall* v.

Williamson, 11 Ala. 839. Though the contrary has been as stoutly maintained: *Roche* v. *Washington*, 19 Ind. 53; 81 Am. Dec. 376; *State* v. *Ta-cha-na-tah*, 64 N. C. 614; *Dupre* v. *Boulard*, 10 La. Ann. 411.

The general rule is that the *lex loci contractus* is controlling, in adjudications involving the validity of marriages (*True* v. *Ranney*, 21 N. H. 52; 53 Am. Dec. 164; Story's Conflict of Laws, sec. 113), though this doctrine has an important exception, which is involved in the case before us. Appellant claims that inasmuch as, at the time of the alleged marriage, there was in this territory a statute prohibiting a marriage between a white person and an Indian (Acts 1866, p. 81), even considering the reservation as a foreign jurisdiction, the marriage was void, because Wilbur thereby committed a fraud upon the law of his domicile, which was the territory. Where a marriage is prohibited, either by the statute or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile, to engage in a contract of marriage, for the purpose of avoiding the prohibition. Their contract will be held void upon their return: *Kinney* v. *Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 690; *State* v. *Kennedy*, 76 N. C. 251; 22 Am. Rep. 683; *State* v. *Bell*, 7 Baxt. 10; 32 Am. Rep. 549; *Pennegar* v. *State*, 87 Tenn. 244; 10 Am. St. Rep. 648; Wharton's Conflict of Laws, sec. 181; *Brook* v. *Brook*, 9 H. L. Cas. 223. In Massachusetts the contrary was held in *Medway* v. *Needham*, 16 Mass. 157, 8 Am. Dec. 131, and that case was followed there until a statute interfered: [88] See notes to same case, 8 Am. Dec. 133. In some courts a marriage contracted without the state by a person under statutory disability with another, whose domicile was in the foreign state, has been equally subjected to a declaration of invalidity. But this seems a harsh rule, as it might involve a perfectly innocent man or woman in unmerited confusion and disgrace; and the contrary was held in a very learned and conclusive opinion of Chief Justice Gray in *Commonwealth* v. *Lane*, 113 Mass. 458, 18 Am. Rep. 509. Respondent insists that this more lenient rule should be followed in the case of a marriage between a white person and an Indian upon a reservation; the *locus* being considered analogous to a foreign state, and the Indian custom the *lex loci*. *Morgan* v. *McGhee*, 5 Humph. 13, sustains the proposition, and *Johnson* v. *Johnson*, 30 Mo. 72;

77 Am. Dec. 598; *Boyer* v. *Dively*, 58 Mo. 510, and *La Riviere* v. *La Riviere*, 77 Mo. 512, go further, and hold that although there may have been no reservation at the place where the marriage took place, if it occurred in what used to be termed "Indian country," it was sufficient if the Indian customs were followed, although, under those customs, husband and wife could separate at will, and marry again. In none of the cases cited, however, does there appear any intimation that any law of the state was violated by the marriage of a white man with an Indian woman, and in Missouri the doctrine of common-law marriages has always been recognized: *Cargile* v. *Wood*, 63 Mo. 501; *Dyer* v. *Brannock*, 66 Mo. 391; 27 Am. Rep. 359. But there was a prohibition in our territorial statute of 1866, and the final question is whether it had any force within the Swinomish reservation, so as to render void any marriage between Wilbur and Kitty, however celebrated.

It has always been conceded that Congress had the right, when a new territory was organized, to exclude from its jurisdiction any lands embraced within the territorial limits [39] for any reason which it saw fit. More frequently than in any other cases this exclusion was provided for as to lands embraced in Indian reservations. But it has not been by any means universal that either the civil or the criminal laws of a territory have been without force within the boundaries of an Indian reservation; and whether they have had such force or not has depended upon the acts of Congress concerning the territories and public lands, and the treaties with various tribes providing for reservations. In *Harkness* v. *Hyde*, 98 U. S. 476, it was held that process from a district court of Idaho could not be served within the Shoshone reservation in that territory, because the act of Congress of March 8, 1863, organizing the territory, provided that it should not embrace within its limits or jurisdiction any territory of an Indian tribe, where, by a treaty with such tribe, their reservation was not to be included within the territorial limits or jurisdiction of any state or territory without their consent, and because, five years later, a treaty was made with the Shoshone Indians, whereby it was agreed that no persons, except agents of the government, should be authorized to pass over, settle upon, or reside in the territory reserved. The court said that this territory "was as much beyond the jurisdiction, legislative or judicial, of the government of

Idaho, as if it had been set apart within the limits of another country or of a foreign state." But in *Langford* v. *Monteith*, 102 U. S. 145, the court acknowledged having made a mistake in the former case, in finding the existence in the treaty of the clause mentioned, and held that where no such clause, or language equivalent to it, was found in a treaty with Idaho Indians, the lands held by them were a part of the territory, and subject to its jurisdiction, so that its process could run therein, although the Indians themselves might be exempt from such jurisdiction. In *United States* v. *McBratney*, 104 U. S. 621, held that the United States circuit court for the district of Colorado had no jurisdiction of a case of murder committed by one white man upon another within the Ute reservation, because the act of March 3, 1875, authorizing the admission of Colorado as a state, contained no exception of jurisdiction over the reservation such as had been made in the treaty with the Indians, but that the state courts alone could try the accused for the offense. An examination of the organic act of Washington Territory shows only this in regard to Indians and their lands: "*Provided*, that nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulations respecting the Indians of said territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed": 10 Stats. at Large, 172.

No act amending or enlarging this proviso came into operation until 1875, when the Revised Statutes of the United States, section 1839, was made applicable to all the territories. In the mean time the treaty with the Swinomish Indians was made, taking effect April 11, 1859. This treaty ceded to the government all the land formerly inhabited by the tribes of Indians joining therein, on both sides of Puget sound, from Vashon island northward to British Columbia, and from the summit of the Cascade mountains to the divide between Hood's canal and Admiralty inlet, but reserved to them certain defined tracts in these words, following the description: "All which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent; but, if necessary for the public

convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them."

This language, both of the organic act and of the treaty [41] was wholly different from that concerning the Idaho or Colorado Indians, and under *Langford* v. *Monteith*, 102 U. S. 145, and *United States* v. *McBratney*, 104 U. S. 621, must be taken to have left the reservation within, and a part of, the territory, for all legislative and judicial purposes not affecting the personal rights and the lands and other property of the Indians. Whether these could have been controlled by territorial statutes we do not pretend to decide. But it must be, it seems to us, by every rule of jurisdiction, that when Wilbur went upon the reservation, even if he went there with the full purpose of procuring Kitty to be his wife, the law of the territory met him there, in all its force, and prohibited him from making a legal marriage with her, under any forms or ceremonies whatever; and she, although an Indian and a mere child, was bound to know that the same prohibition attached to her. Therefore, the only attempt to constitute a marriage between them was void, and the fact that the prohibiting statute was repealed a short time after they commenced to live together, viz., in 1868, made their case no better, since all that appears in the record concerning them subsequently is, that they cohabited, and cohabitation did not constitute a marriage: *In re McLaughlin's Estate*, 4 Wash. 570.

The order of the superior court, granting letters of administration to respondent must be reversed and the matter remanded, with direction to grant letters to appellant, if she be still capacitated; otherwise, to some other suitable person, as provided by law. Appellant protests against any administration, but we regard this as one of the cases where such a proceeding is most fitting, since deceased may have left heirs who are entitled to share in his estate, or there may be creditors who are unpaid. The court acquired jurisdiction of the estate through respondent's petition, and should now proceed regularly to final distribution.

HOYT and SCOTT, JJ., concur.

DUNBAR, C. J., and ANDERS, J., not sitting.

MARRIAGE AND DIVORCE—MARRIAGES PROHIBITED BY STATUTE.—A negro man and a white woman domiciled in Virginia went to the District of Columbia, and were there married. After remaining there a few days they

returned to Virginia and continued to reside there as man and wife. The laws of Virginia prohibit marriages between white persons and negroes, and these parties rendered themselves liable to indictment for lewd cohabitation: *Kinney* v. *Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 680; but see *Medway* v. *Needham*, 16 Mass. 157; 8 Am. Dec. 131. A marriage valid where celebrated is, as a general rule, valid everywhere, but a modification of this rule exists as to marriages contrary to the law of nature, as recognized in christian countries, and marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication: *Pennegar* v. *State*, 87 Tenn. 244; 10 Am. St. Rep. 648. See the extended note to *Greenlow* v. *James*, 56 Am. Rep. 607, and the note to *Cartwright* v. *McGown*, 2 Am. St. Rep. 117.

MARRIAGE AND DIVORCE.—VALIDITY OF INDIAN MARRIAGES: See *Rocks* v. *Washington*, 19 Ind. 53; 81 Am. Dec. 376, and the note to *Johnson* v. *Johnson*, 77 Am. Dec. 606.

HENNESSY *v.* NIAGARA FIRE INSURANCE CO.

[3 WASHINGTON, 21.]

INSURANCE—ARBITRATION, DEMAND FOR, WHEN UNNECESSARY.—Though a policy of insurance declares that in the event of a disagreement as to the amount of the loss it shall be ascertained by appraisers, yet if an insurer denies all liability, and does not demand the appointment of appraisers, an action may be sustained against him without first procuring an appraisement to fix the amount of his loss.

INSURANCE.—PROOFS OF LOSS ARE PROPERLY RECEIVED IN EVIDENCE and submitted to the jury for the purpose of showing compliance in respect to them with the conditions of the policy. They are also relevant when the defense is interposed that the plaintiff has been guilty of having sworn falsely therein.

DEPOSITIONS, CONTINUED ABSENCE OF WITNESS, WHETHER MUST BE SHOWN.—If depositions are properly taken a short time before a trial on the ground that the witness is about to depart from the jurisdiction of the court, they may be admitted in evidence without proof that he cannot be brought to testify in person. The party objecting to the use of the depositions must show that the presence of the witness could have been procured at the trial.

Jones, Voorhees, and Stephens, for the appellant.

Hyde and Reagan, and Turner, Graves, and McKinstry, for the respondent.

[22] SCOTT, J. This action was brought on an insurance policy to recover the amount insured on a stock of merchandise, which was burned. Judgment was rendered for the plaintiff, and the defendant appeals.

It is contended that the action was prematurely brought, in that the plaintiff failed to furnish proofs of loss after the fire, under the conditions of the policy, and in that the policy

provided that in the event of a loss and in case of a disagreement as to the amount thereof, the same should be ascertained by two competent and disinterested appraisers, the assured and the company each to select one, and the two so chosen to select a competent and disinterested umpire.

It appears that proofs of loss were furnished by respondent to appellant, and that they were rejected for certain reasons, which were specified; whereupon respondent again furnished proofs which complied with said objections. These proofs were returned to him with a denial upon the part of the company of any liability, on the ground that the claimant had sworn falsely in making his proofs of loss. The last proofs furnished appear to have been technically correct under the terms of the policy, and the appellant having denied any liability whatever for the loss on the ground of false swearing, could not rely upon the provision of the policy relating to an arbitration in case of disagreement as to the amount of such loss. Furthermore, it does not appear that either party demanded that such an arbitration be had, and these points are not well taken.

It is further contended that the court erred in admitting the proofs of loss in evidence, and that the same should not have been submitted to the jury. It is contended by the respondent that the proofs were not submitted to the jury, and the record fails to show that they were. The proof was properly admitted for the purpose of showing that the plaintiff had complied with the terms of the policy in furnishing such proofs, even though this was a question for the court alone to determine. These proofs, however, subsequently became relevant in relation to the defense set up that the plaintiff had sworn falsely therein.

It is further contended that the court erred in allowing two depositions to be read in evidence. These depositions were taken a short time before the cause was brought to a trial, for the reason that the witnesses were about to depart from the jurisdiction of the court. It is not claimed that there were not sufficient grounds for taking them in the first instance, but it is contended that, under section 1677 of the Code of Civil Procedure, it should have been made to appear at the trial by the party offering them that the witnesses could not be brought to testify in person. We are of the opinion that this point is not well taken. Nothing appearing the contrary, it will be presumed that the reasons which

existed at the time the depositions were taken, and which authorized them, were still in existence at the trial, and it was incumbent on appellant to show otherwise to avail itself of such objection.

It is further contended that the verdict is unsupported by the evidence, and that no recovery should have been allowed upon the ground that the plaintiff swore falsely in making his proofs of loss aforesaid. A good deal of testimony was introduced upon the part of the defendant to the effect that it would have been impossible for the plaintiff to have sustained the loss claimed by him under the circumstances which were proven to have existed. There was some counter-evidence, however, and the whole matter [94] was for the jury to determine, and in finding for the plaintiff it must be held that they found for him upon all of these issues. We are of the opinion that there was testimony sufficient to sustain the verdict, and that there is no ground for any interference therewith by an appellate court in this particular.

The last error alleged is, that the court erred in refusing to permit the defendant to prove the damage to the building by the fire in question, in order to show the extent of the fire.

An inspection of the record shows that the court did permit proof of the extent to which the building was damaged, but refused to allow the defendant to prove what it would cost to repair the building.

We find none of the points alleged as error to be well taken, and the judgment is therefore affirmed.

DUNBAR, C. J., and STILES, ANDERS, and HOYT, JJ., concur.

INSURANCE — CONDITION FOR ARBITRATION — WAIVER. — When, upon a loss under a policy of fire insurance, the insurer immediately denies all liability under the policy, and repels every effort on the part of the insured to obtain an adjustment of the loss, such insurer must be held to have waived an arbitration clause in the policy requiring an award by arbitration as a condition precedent to a right of action: *Savage* v. *Phœnix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591, and note, with the cases collected.

DEPOSITIONS, WHETHER ADMISSIBLE WITHOUT PROOF THAT WITNESS COULD NOT ATTEND.—A deposition taken under an act to perpetuate testimony is not admissible in evidence where the witness is living, without proving his inability to attend court: *Jackson* v. *Rice*, 3 Wend. 180; 20 Am. Dec. 683, and note. See the discussion of this question in the note to *Farrow* v. *Commonwealth Ins. Co.*, 29 Am. Dec. 567.

RUSSELL *v.* CITY OF TACOMA.

[8 WASHINGTON, 156.]

A MUNICIPAL CORPORATION, IN IMPROVING AND CARING FOR A PUBLIC PARK, is exercising a franchise conferred upon it for the public good, and not for its private advantage, and, therefore, is not liable for injuries received by a laborer in such park through the negligence of its officers.

Heilig and Hartman, and Wiley and Bostwick, for the appellant.

F. H. Murray, and Doolittle and Fogg, for the respondent.

156 ANDERS, J. The city of Tacoma is a city of the first class. Its charter was framed and adopted in accordance with the provisions of the act of the legislature entitled "An act to provide for the government of cities having a population of twenty thousand or more inhabitants, and declaring an emergency," approved March 24, 1890: Laws, 1889–90, p. 215. Cities organized under this act are empowered to "lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof," and these provisions of the statute are incorporated into and are a part of the city charter.

By an act of Congress, approved December 17, 1888, there was granted to the city of Tacoma a license to occupy and control for the purposes of a public park for the use and benefit of the citizens of the United States, and for no 157 other purposes whatever, a certain described tract of land known as Point Defiance Park. This license is subject to the condition expressed in the act, that the United States may take possession of and occupy said land, or any part thereof, for military or other purposes whenever the proper officers of the United States may see fit to do so.

The charter of the city of Tacoma provides for a board of park commissioners, consisting of five members, to be appointed by the mayor and confirmed by the city council; and it is made the duty of the board, subject to such rules and regulations as the city council may by ordinance provide, among other things, to take charge of and exercise control over all parks belonging to the city, to make report to the city council from time to time regarding the condition of the parks, and to recommend appropriations by the council

for the improvement of the parks, and when such appropriations have been made, expend the same in such improvements; but no member of said commission shall have power to create any debt, obligation, claim, or liability except with the express authority of said commission, conferred at a meeting thereof duly convened and held; to make such rules and regulations in regard to the use of the parks as shall best subserve the interests of the public; and generally to do all things necessary and proper to secure for the public the free use and enjoyment of said parks.

While the board of park commissioners were in possession of Point Defiance park, and were improving the same for park purposes, appellant was injured by an explosion of giant powder and dynamite which occurred in a building erected thereon by the commissioners. It appears that at the time of the explosion the appellant was a laborer under the control of a foreman employed by some one connected with the board of park commissioners, and that the powder and dynamite which exploded were stored in a [150] building used for the purposes of a blacksmith-shop and for storing tools. The blacksmith was engaged in sharpening tools, and the explosives were ignited by sparks from his forge or anvil. This action was brought to recover damages for injuries to the person and property of the appellant, alleged to have been caused by the carelessness and negligence of the city in thus storing dangerous explosives in the place above mentioned. The court below held that the city was not liable, and dismissed the action, and plaintiff appeals.

The only question necessary to be determined is, whether the city is liable for malfeasance or misfeasance of its officers while employed in the prosecution of a public work of the character of the one under consideration. It is contended by the learned counsel for the appellant that the board of park commissioners while engaged in this work were but agents of the city, and that the work itself was but a private enterprise undertaken by the city for its own benefit, and if this be true there is no doubt that the city is liable to the same extent that a private corporation or individual would be liable under the same circumstances.

As supporting the appellant's contention, that the improvement of Point Defiance park was an improvement of mere local concern, affecting merely the interests of the municipality, we are cited to the case of *State* v. *Schweickardt*, 109

Mo. 496. It appears from an examination of this case that the city of St. Louis was the owner of Forest park, and, under the power given it by law, was attempting to lease a portion of it for the sale of intoxicating liquors and other refreshments at the park. Proceedings were instituted by the attorney general, in the name of the state, to prevent the city from so doing, and the court held that "in relation to the property in question, and the discretionary control of the city over it, it must be regarded [159] as a matter of purely local concern, as held and owned by the city not in its political or governmental capacity, but in a *quasi* private capacity, in which the municipal authorities act for the exclusive benefit of the corporation whose interests they represent."

We have no doubt of the correctness of that decision, and, if the facts were the same in the case at bar, that case would be cheerfully recognized as high authority in favor of the appellant's contention. But in one respect at least the facts of this case are essentially different. There the city was the owner of the park, and was leasing it for its own private emolument. In this case the city of Tacoma is not the owner of Point Defiance park, and has no interest in it whatever excepting a license to occupy and control it for the purposes of a public park. It is frankly conceded on behalf of the appellant that if the acts complained of were not proprietary merely, but public and governmental, the city is not liable in this action. While it is not always easy to draw the line between the public or governmental and private powers of municipal corporations, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good, and not for private corporate advantage. And this being so, it is not liable for the acts or omissions of its officers in that behalf: *Murtaugh* v. *City of St. Louis*, 44 Mo. 479; *Hart* v. *Bridgeport*, 13 Blatchf. 289; *Richmond* v. *Long*, 17 Gratt. 875; 94 Am. Dec. 461; *Mead* v. *New Haven*, 40 Conn. 72; 16 Am. Rep. 14; *Ham* v. *Mayor etc.*, 70 N. Y. 459; *Tindley* v. *Salem*, 137 Mass. 171; 50 Am. Rep. 289; *Howard* v. *Worcester*, 153 Mass. 426; 25 Am. St. Rep. 651; *Curran* v. *Boston*, 151 Mass. 505; 21 Am. St. Rep. 465; *Sherbourne* v. *Yuba County*, 21 Cal. 113; 81 Am. Dec. 151.

In *Murtaugh* v. *St. Louis*, 44 Mo. 479, it was sought to make the city of St. Louis respond in damages for injury to a nonpaying patient caused by the negligence of hospital

officers and servants, and, in speaking of the nonliability of [100] municipal corporations for the acts of their officers and agents, the court declared the general result of the authorities as follows: "Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."

The same doctrine was enunciated in other cases above cited; and in *Mead* v. *New Haven*, 40 Conn. 72, 16 Am. Rep. 14, it was accordingly held that the city was not liable for the negligence of an inspector of steam-boilers, and in *Ham* v. *Mayor etc.*, 70 N. Y. 459, that the city was not liable for the negligence of servants employed by the department of public instruction. In *Tindley* v. *Salem*, 137 Mass. 171, 50 Am. Rep. 289, it was held, upon an elaborate review of the authorities, that the defendant city was not liable for the negligence of its servants in discharging fireworks which were purchased and used for the purposes of a public celebration. In *Howard* v. *Worcester*, 153 Mass. 426, 25 Am. St. Rep. 651, the plaintiff was injured by the negligent blasting of rock in excavating the foundation for a public schoolhouse, and the court held that, as the work was purely a benefit to the public, no liability was thereby created against the city: See, also, *Condict* v. *Jersey City*, 46 N. J. L. 157; *Bryant* v. *St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; and *Barney* v. *Lowell*, 98 Mass. 570.

Upon the liability of towns for defects in their public commons the supreme court of Massachusetts, in *Clark* v. *Waltham*, 128 Mass. 567, said: "The plaintiff was injured while traveling upon a public park having footpaths across it, which, it is alleged, the defendant had negligently suffered to be out of repair and [101] unsafe. The park was conveyed to the town upon the condition that it should 'forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham.' By accepting the deeds of conveyance the town agreed to the condition, and therefore

holds the park for the use of the public. It had constructed footpaths and walks over the park in various directions, but these paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable under the statutes respecting highways or townways for any defect or want of repair which may exist in them: *Oliver* v. *Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Gould* v. *Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit. For a breach of such a duty a private action cannot be maintained against a town or city, unless such action is given by statute."

Other reasons are urged by counsel for respondent for sustaining the judgment of the lower court, but as what we have said disposes of the case, it is not necessary to discuss the points made.

The judgment is affirmed.

DUNBAR, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF OFFICERS.—A municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the city or its officers for the public good: *Ulrich* v. *St. Louis*, 112 Mo. 138; 34 Am. St. Rep. 372, and note; *Whitfield* v. *City of Paris*, 84 Tex. 431; 31 Am. St. Rep. 69, and note; *Goddard* v. *Inhabitants*, 84 Me. 499; 30 Am. St. Rep. 373, and extended note.

STATE *v.* BUTLER.

[8 WASHINGTON, 194.]

CRIMINAL LAW.—SOLICITATION TO COMMIT ADULTERY is not of itself an attempt to commit adultery.

E. K. Pendergast, prosecuting attorney.

James A. Haight, for the state.

194 SCOTT, J. The defendant was charged with attempting to commit adultery, and was tried and convicted. The body of the information is as follows:

195 "Comes now E. K. Pendergast, prosecuting attorney for Douglas county, in the state of Washington, and by this, his information, as provided by law, charges one James Butler with the crime of attempting to commit adultery, in the following manner, to wit:

"He, the said James Butler, on the third day of September, A. D. 1892, in the county of Douglas and state of Washington, did, unlawfully, willfully, maliciously, and feloniously intend then and there to have carnal knowledge of the body of one Caroline Skett, the lawful wife then and there of one Julius Skett, who was then alive; and the said James Butler, in pursuance of the said unlawful, willful, malicious, and felonious intent, then and there, falsely, wickedly, unlawfully, and maliciously, by means of promises of the payment of money and by direct invitation by word of mouth, and by laying on of hands by the said James Butler upon the person of the said Caroline Skett in a lewd and lascivious manner, and in the absence of all other persons, except the said James Butler and the said Caroline Skett, and by various other means, did solicit and incite and endeavor to persuade and procure the said Caroline Skett to have sexual intercourse then and there with him, the said James Butler, and the said James Butler was then and there the lawful husband of one certain person other than the said Caroline Skett, and whose true name is to said prosecuting attorney unknown. All of which is contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

A motion in arrest of judgment, on the ground that the information did not charge any offense, was made, which the court granted, and ordered the defendant discharged. The state appeals. No brief has been filed by the respond-

ent. From the argument of appellant it seems that some question was raised as to whether adultery is a crime in this state, but without going into the question as to whether our statutes upon this subject, which were enacted while we were under a territorial form of government, were repealed by virtue of certain congressional legislation [196] affecting the territories, we will, for the purposes of this case, take it for granted that they are in force. No statement of facts was settled, and the testimony introduced at the trial is not here.

The only question presented and argued by appellant is as to whether solicitation to commit adultery is an attempt to commit adultery. It is not contended that Caroline Skett was a consenting party, or willing to commit the act with the defendant. The information contains no such allegation, and the case stands as though she was an unwilling and resisting party. It is not contended that there was any act on the part of the defendant going to an attempt beyond soliciting the said Caroline Skett, and endeavoring to obtain her consent. Is mere solicitation an attempt to commit adultery? It being impossible for one alone to commit adultery, as that requires the co-operation of two persons, it would seem to follow logically that one acting singly could not make an attempt. One person could no more attempt to commit adultery than he could attempt to commit a riot, which, under our statutes, requires the participation of three or more persons. The instances given in the books where the solicitation of another to commit a crime is held to be an offense generally relate to those acts or crimes which can be performed or committed by one person, or where the solicitation to commit the crime is an offense in itself, as distinguished from an attempt.

It is urged that a person may be convicted of adultery, or of an attempt to commit adultery, although not a direct participant in the act, by reason of aiding or abetting, but in such a case where an attempt is charged against such third person it should appear that there were two persons willing to commit the act of adultery, and that something was done in the way of an attempt.

The cases upon this subject are very limited in number. [197] The case of *State* v. *Avery*, 7 Conn. 266, 18 Am. Dec. 105, cited by counsel for appellant, which was decided in 1828, does not sustain his contention. That case was based upon a letter sent by the defendant to the wife of another man,

containing words importing that she had acted libidinously towards the writer, and inviting her to an assignation for adulterous purposes, and it was held that the writing and sending of such letter was libelous. It was further said that it was immaterial to inquire whether the facts stated in the information amounted to a libel or a solicitation to commit a greater crime, for if they constituted an indictable offense within the jurisdiction of the superior court, it was sufficient for the purposes of that case. It was not decided that solicitation was an attempt to commit adultery.

In *Smith* v. *Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686, decided in 1867, it was held that such solicitation did not amount to an attempt. A distinction has been sought to be drawn in this particular to the effect that solicitation to commit adultery is indictable as an attempt in those states where adultery is a felony, which was the case in the state of Connecticut, while in Pennsylvania adultery was but a misdemeanor. The distinction attempted to be drawn, it seems to us, is not sound in principle. It is based on the ground that in trivial misdemeanors the law will look upon an attempt to commit them as not of sufficient gravity to justify or call for punishment. The decision of the case last cited, however, was not founded upon this distinction, although it recognizes the fact that such a one has been sometimes made. In citing *State* v. *Avery*, 7 Conn. 266, 18 Am. Dec. 105, the court evidently entertained a different view. The opinion says: "An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law. These were the words of Baron Parke in the case of *Rex* v. *Roderick*, 7 Car. & P. 795, delivered in the year 1837. They have been adopted by the compilers [198] on criminal law: 1 Russell on Crimes, 46; 1 Archbold's Criminal Pleading and Evidence, 19; Wharton's Criminal Law, 79, 873."

And apparently this had the sanction of the court. The reasons given in that case, showing why solicitation should not be held an attempt to commit adultery, apply with equal force whether adultery be a misdemeanor or a felony. These relate to the difficulty of determining what is a solicitation. "What expressions of the face," says the court, "or double *entendres* of the tongue are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every cyprian who nods or winks to the married men she meets

upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste and what were lewd? It would be a dangerous and difficult rule of criminal law to administer."

If adultery is a crime in this state it is a felony, and if solicitation is an attempt to commit adultery it is a criminal offense here: Pen. Code, sec. 303. It will be observed that this section makes no distinction between an attempt to commit a felony and an attempt to commit a misdemeanor, except as to the degree of punishment, and the distinction above mentioned could not be recognized here even if adultery was but a misdemeanor under the statutes. It may be well to note, however, what some of the courts and law-writers have said relating to the subject under consideration.

In the case of *Commonwealth* v. *Willard*, 22 Pick. 476, it was held that the purchaser of spirituous liquor sold in violation of the statute does not subject himself to any penalty, either at common law as inducing the seller to commit a misdemeanor, or under the statute. It was said in that case: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor 199 to counsel, entice, or induce another to commit a crime, and where it does not. In general it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice, or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

In the case of *Commonwealth* v. *Harrington*, 3 Pick. 26, it was held that the letting of a house for the purposes of prostitution, with the intent that it should be thus used, was an offense at the common law. The keeping of such a disorderly house was not a felony, but a misdemeanor of a high and aggravated character, tending to general disorderly breaches of the peace, and a common nuisance to the community. There was no statute in Massachusetts relating to it.

In Wharton's Criminal Law, 9th edition, section 179, in

speaking of solicitations, the author says: "Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they, in themselves, involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged." "But," says the author, "is a solicitation indictable when it is not either: 1. A substantive indictable offense, as in the instances just named; or 2. A stage towards an independent consummated offense?" And he says: "The better opinion is that where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consummation [200] of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative."

And he maintains that solicitation is not an attempt to commit adultery. In speaking of the subject further, he says: "For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's 'Don Juan,' of Rousseau's 'Emile,' or of Goethe's 'Elective Affinities.' Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make bare solicitations or allurements indictable as attempts, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's action as to make the former the cause of the latter? An attempt, as has been stated, is such an intentional

preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation on the one hand and the proposed illegal act [201] on the other the resisting will of another person, which other person refuses assent and co-operation."

In a somewhat later work, 1 Bishop's Criminal Law, 7th edition, a partially contrary view is indorsed. This author goes farther. In section 768 he says: "Though, to render a solicitation indictable, it is, as in other attempts, immaterial in general whether the thing proposed to be done is technically a felony or a misdemeanor; still, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance."

He is of the opinion that solicitation is an attempt to commit adultery as a necessary step or ingredient in the offense: 1 Bishop's Criminal Law, 7th ed., sec. 767.

The question is a somewhat vexed one under the conflict of authorities relating to the various phases of the subject. The inquiry in this case is not whether solicitation to commit adultery is an offense in itself of a distinct character, but whether it is an offense because it is an attempt to commit adultery. The instances of such solicitation which have been brought to the attention of the courts are but few indeed, extending over a long period of years, but resort can be had to some of a kindred nature, or perhaps more properly, which have a bearing on some of the principles involved.

In the case of *Rex* v. *Butler*, 6 Car. & P. 368, decided in 1834, sometimes cited, it was said: "An attempt to commit a misdemeanor created by statute is a misdemeanor itself," citing *Rex* v. *Harris*, 6 Car. & P. 129. In *Shannon* v. *Commonwealth*, 14 Pa. St. 226, it was held that a conspiracy to commit adultery was not an offense. And in *Miles* v. *State*, 58 Ala. 390, a similar decision was arrived at. Adultery was but a misdemeanor, however, in that state also, though it is not apparent that any importance was attached to this fact in either of these cases. In [202] *Cox* v. *People*, 82 Ill. 191, it was held that solicitation to commit incest was not an attempt to

commit the crime of incest, which was a felony. We have not failed to note the criticism of this case, and the citation it relies on from Wharton's Criminal Law, above quoted by Mr. Bishop in his valuable work. But the case also relies on *Smith* v. *Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686, and *Commonwealth* v. *Willard*, 22 Pick. 476, and these cases are authority, as we view them, with other authorities herein cited, on the ground that the distinction mentioned sometimes drawn between attempts to commit felonies and attempts to commit misdemeanors, or between attempts to commit grave as distinguished from trivial misdemeanors, is not a well-established one, nor well founded when viewed merely as an attempt and not as a substantive offense.

Now, it seems to us that solicitation to commit adultery is no part of the act of adultery itself, and consequently cannot be held to be an attempt. What is it? It involves the expression of a desire and a willingness on the part of one person to commit the act of adultery with another, and an attempt to get that person's consent, but no more. Follow it a step farther. Suppose the consent of the other person is obtained, and, in pursuance of it, if there is no immediate opportunity to gratify the then mutual desire, a conspiracy is entered into to commit the offense between these persons, which involves the expressed consent and agreement of both of them, and some understanding between them as to when and where the offense shall be committed, and the naming of a propitious time and place to commit it. It seems that this would be much more in the way of an attempt than the case presented here, and if that does not amount to an offense or an attempt, how can it be said that such an intention and willingness, coupled with solicitation upon the part of one person only, can amount to an attempt to commit the offense?

203 We are of the opinion that the judgment of the superior court should be affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

CRIMINAL LAW—SOLICITING CRIME.—Solicitation to commit an offense is not an attempt in a legal sense: *Smith* v. *Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686, and note; note to *People* v. *Moran*, 20 Am. St. Rep. 744. Solicitation to commit a felony is an indictable offense at common law: *Commonwealth* v. *Randolph*, 146 Pa. St. 83; 28 Am. St. Rep. 782, and note. The solicitation of another to commit adultery is a high crime and misdemeanor: *State* v. *Avery*, 7 Conn. 266; 18 Am. Dec. 105.

TACOMA GROCERY CO. *v.* DRAHAM.

[8 WASHINGTON, 263.]

AN ATTACHMENT BASED UPON A PAPER HAVING THE FORM OF AN AFFIDAVIT, except that it does not appear either upon its face nor by extrinsic evidence to have been sworn to by any officer, is absolutely void, and a judgment based thereon, in a case in which there was no personal service of summons, is equally void.

JUDICIAL SALES.—If it appears that a judgment has been entered, and an execution issued thereon under which a sale was made, and afterwards confirmed by the court, it will be presumed that the proceedings leading up to such sale were regular.

W. I. Agnew and J. W. Robinson, for the appellant.

C. W. Hartman, for the respondent.

264 HOYT, J. This action was brought by the appellant to quiet the title to a certain piece of real estate as against the defendant. The source of title of each of the parties was the same; both claimed by virtue of execution sales against Henry Bickle, Jr. There was no personal service on the defendant, and the validity of the judgments and sales depends upon the regularity of attachment proceedings which were instituted at the time of the commencement of the actions. It clearly appears from the record that the sale under which appellant claims was the first one, and, if valid, conveyed to it a good title.

It is contended on the part of the respondent that the judgment under which this sale was made was absolutely void, for the reason that the court never obtained any jurisdiction of the subject matter. The ground of such contention is, that there was no affidavit filed with the clerk as a foundation for the attachment proceedings.

Upon this question the record shows that a paper was filed in the form of an affidavit signed by a person who represented himself as the attorney for the plaintiff, but there is nothing upon the face thereof to show that it was ever sworn to. Such being the case, the question is presented as to the force to be given such paper. If it should be treated as having no effect, then it must follow that the attachment proceedings founded thereon were absolutely void. It does not appear from the record that the paper was in fact sworn to. If it did, it is probable that, under our liberal statute as to amendment of all papers in attachment proceedings, the omission of the officer to sign the jurat could be treated

as a clerical error, and the proceedings [265] sustained. But, in the absence of proof to that effect, there is nothing to show that the facts set up in such paper ever had their truth vouched for by the oath of any person. In other words the paper upon its face does not show that it is an affidavit, and there is no proof in the record to supplement the showing upon the face of the paper. It must, therefore, for the purposes of this case, be considered as no affidavit at all, and it must follow that there was no foundation whatever for the issuing of the writ of attachment, and that it was absolutely void.

Some cases have been cited by counsel for appellant where the absence of the signature of the officer to the jurat has been held not to be fatal to the proceedings. Such cases, however, are not numerous. We have been able to find only two which squarely establish such a doctrine: *Wiley* v. *Bennett*, 9 Baxt. 581; *Stout* v. *Folger*, 34 Iowa, 71; 11 Am. Rep. 138.

These cases would be authority for the contention of the appellant that such omission did not render the proceedings void, if the facts shown by the record had been similar to those in the case at bar, but such was not the case. There it was made clearly to appear to the court that the affidavit had been in fact sworn to, and it was held that, as the required facts had been set forth in the form of an affidavit, and their truth vouched for by the oath of the party, he should not be deprived of his rights by reason of the inadvertent omission of the officer to sign the jurat. We have been unable to find a single case which went so far as to hold that the proceedings could be sustained where the statute required an affidavit without its being made affirmatively to appear in some manner that an affidavit was in fact made and filed. In our opinion, no title passed to plaintiff by virtue of the execution sale under which it claims title, for the reason that the judgment upon which such sale was made was absolutely void.

[266] Appellant makes the further contention that, even if such results must follow from the failure to make and file an affidavit, the judgment could only be attacked in a direct proceeding for that purpose. This would doubtless be true if the action of the court in granting the judgment was simply erroneous, but it was more than that; it was void, for the reason that the court never had any jurisdiction. Such a

judgment is a nullity, and may be attacked in any place where rights are attempted to be asserted under it.

There is a point made in appellant's brief, that it should be relieved from the judgment by reason of the fact that it asked for an adjournment of the taking of proofs before the referee for the purpose of allowing it to produce at the adjourned day a witness to prove that the affidavit was in fact sworn to, and that the referee refused to grant such adjournment. If the appellant had sought relief from the action of the referee by a sufficient showing before him and in the lower court upon the presentation of his report, and had been unable to obtain it, this court could grant such relief. But nothing of this kind was done. The case was not before the referee for him to take the testimony and report findings of fact and law, but only that he might take the proofs offered, and report the same to the court; hence the action of the appellant in simply making a request for such adjournment, and, so far as the record shows, acquiescing in the refusal of the referee to grant the same, without being followed by any attempt to further secure its rights in that regard, will not justify us in interfering with the judgment on account of the refusal of the adjournment by the referee. Upon the report of the referee the case came before the court for trial, and if the appellant felt that it had been denied, an opportunity to introduce such proofs as were necessary before the referee, it should have asked leave to introduce the same upon the hearing.

[267] The court below not only refused any affirmative relief on the part of the appellant, but, upon affirmative pleadings on the part of the defendant, quieted his title as against the plaintiff. It therefore becomes necessary for us to examine the proceedings under which the defendant claims title. Their regularity is in no manner attacked by the counsel for the appellant, excepting that the statement is made that the proceedings under the execution upon which the sales were made were not proven. None of these criticisms went to the jurisdiction of the court in entering the judgment and issuing the execution, and, as it was proven that the sale had been made by the sheriff thereunder, and the proceedings on such sale had been regularly confirmed by the court, enough appeared to establish a *prima facie* presumption that the sales were regularly made.

The judgment of the lower court must be affirmed.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

JUDICIAL SALES—PRESUMPTION IN FAVOR OF REGULARITY OF ACTS OF OFFICERS MAKING.—Every reasonable presumption will be indulged in favor of sustaining the ministerial acts of officers making judicial or execution sales: *Evans* v. *Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701; *Howard* v. *North*, 5 Tex. 290; 51 Am. Dec. 769, and note; *Greer* v. *Wintersmith*, 55 Ky. 516; 7 Am. St. Rep. 613, and note. The regularity of a sheriff's sale is presumed: *Childs* v. *McChesney*, 20 Iowa, 431; 89 Am. Dec. 545; *Thomas* v. *Malcom*, 39 Ga. 328; 99 Am. Dec. 459, and note. The regularity of the proceedings leading up to a sheriff's sale will be presumed: *Leyer* v. *Doyle*, 11 Rich. 109; 70 Am. Dec. 240. See, also, the note to *Hall* v. *Stevenson*, 20 Am. St. Rep. 808.

ATTACHMENT—AFFIDAVIT.—NECESSITY FOR OFFICER'S SIGNATURE: See the extended note to *Fridenberg* v. *Pierson*, 79 Am. Dec. 168.

EDISON GENERAL ELECTRIC COMPANY *v.* CANADIAN PACIFIC NAVIGATION COMPANY.

[8 WASHINGTON, 370]

FOREIGN CORPORATIONS.—If the laws of a state or country provide that foreign corporations may register in the manner therein prescribed, and shall then be entitled to the privileges of domestic corporations, but if any of them shall do business without such registration, it shall incur a penalty, not exceeding five dollars per day, for every day during which it carries on business, this is not a prohibition against its doing business, and therefore a contract made by it, though it had not registered, is valid and enforceable.

CONTRACT, RETENTION OF BENEFITS OF.—An instruction to a jury that if plaintiff performed the work and furnished the materials specified in the contract, and substantially performed all its conditions, and the defendant retained the materials in his possession, and made use of them and of the fruits of the work performed by the plaintiff, and did not offer to return such materials, then the plaintiff is entitled to the contract price, is erroneous if, when considered in connection with another instruction, it may have lead the jury to infer that there was some duty on the part of the defendant to return the materials for which he wished to avoid liability.

A CONTRACT BY WHICH A PURCHASER AGREES TO PAY FOR MATERIALS AND LABOR FURNISHED thereunder, when the work has been completed and found to be in good working order, is not satisfied by the existence of good working order at the moment of completion, if the events almost immediately succeeding such completion conclusively establish that the result accomplished was not that contemplated by the contract.

Struve, Allen, Hughes, and McMicken, for the appellant.

Preston, Albertson, and Donworth, and Burke, Shepard, and Woods, for the respondent.

871 HOYT, J. This action was brought to recover for materials furnished and labor performed in pursuance of a written contract between the plaintiff and the defendant. Such contract was in substantially the following form:

"*This agreement* made and entered into this twenty-fourth day of December, 1890, by and between the Edison General Electric Company, hereinafter called the 'company,' and the Canadian Pacific Navigation Company, Ltd., hereinafter called the 'purchaser.'

"The terms and conditions of this agreement are such that the company agrees, for the sum of three hundred and fifty ($350) dollars, and, in consideration of the mutual promises made below, to furnish the following apparatus and material necessary to change the existing electric light system on board the said purchaser's steamer Islander to conform to the Edison system as regards lamps and sockets; 220 Edison key sockets, 220 Edison 16 c. p. lamps, the necessary fittings required to fit with Edison sockets the existing chandeliers and brackets, the necessary wire to renew circuit in stokeroom.

872 "The company will furnish the services of an expert to make the changes from the existing system to the Edison system, to overhaul the wires where necessary, for the sum of five ($5) dollars per day from the time he leaves Seattle until his return, and the necessary living expenses while employed on steamer and during time en route from and to Seattle, and traveling expenses from and to Seattle.

"In case any material not included in this contract is desired the purchaser agrees to give the company a written order for the same, and a charge for said extras is to be mentioned in said order.

"In consideration of the above the purchaser agrees to pay the said company for all material and labor furnished under this agreement when the work has been completed and found to be in good working order."

The answer of the defendant put in issue many of the allegations of the complaint, and alleged, by way of affirmative defense, that the contract in question was made and to be performed in the province of British Columbia; that by the laws of said province a foreign corporation may register in the

manner provided, and thus secure practically the rights of a domestic corporation as to the transaction of business in the province; that if it transact business in the province without having so qualified itself, it shall incur a penalty not exceeding five dollars for every day during which business is so carried on; that plaintiff company was a foreign corporation, and had not in any manner complied with the provisions of such laws, and that by reason of such noncompliance the contract entered into was void. These facts were set out in detail in the answer so that the question of the validity of the contract under the laws of said province was fully presented. The court upon motion struck out one of the paragraphs of said defense, and its action in so doing is the first error assigned by appellant. This ruling had no effect upon appellant's [373] rights, and it is not necessary that we should decide as to its correctness.

The next error assigned is founded upon the action of the court in sustaining respondent's demurrer to this affirmative defense. It held that the terms of the law therein pleaded were not such as to make void contracts of foreign corporations that had not complied with its provisions. The only provision in the statute set out in the defense which tended materially to sustain the contention of the appellant was that in which it was provided that for every day that business was done by a foreign corporation, without having complied with the statute, it should pay a penalty as therein provided.

There is some diversity among the cases in the construction of laws of this kind, but the weight of authority seems to establish the doctrine that it is the duty of the courts to look at the whole statute, and therefrom determine as to what was the intent of the legislature. If by the terms thereof the act is made unlawful it will usually be construed to amount to a prohibition of said act, and the imposition of a penalty will also amount to a prohibition, if, from the language used, such seems to have been the intent of the legislature. But in the case at bar, while the company is liable to the penalty provided in the statute, there is nothing in the act which in terms prohibits the transaction of business, or declares it to be unlawful, and the particular language of the clause which imposes the penalty has no tendency to establish either of said propositions. On the contrary, its language fairly construed would seem to contemplate that the company might do business without such registration, but if it

did it should pay the penalty therein prescribed for the privilege of so doing.

The cases cited by appellant, when applied to the facts of this case, have little tendency to sustain its contention. The investigation which we have been able to give to the [374] adjudged cases tends to support the statement made by respondent in its brief that a provision like the one under consideration has never been held to render contracts void, though entered into without the authority of the statute. Some of the cases cited by appellant contain expressions to the effect that the imposition of a penalty for the performance of an act is equivalent to declaring it unlawful, but an examination of the facts will show that the provisions which they were construing were clothed in far different language than the one under consideration. The demurrer was properly sustained.

The next error assigned is, that the court erred in giving the following instruction: "If the jury believe and find from a preponderance of the evidence that the plaintiff furnished the materials and performed the work specified to be furnished and performed in the contract in suit, and in all respects substantially performed all the conditions on its part, and that the defendant retained said materials in its possession, and made use of the same and of the fruits of such work performed, and did not return or offer to return, said materials to the plaintiff, then the plaintiff would be entitled to a verdict of the jury for the amount of the contract price for said labor and materials specified in said contract."

This error seems to us to be well assigned. There was nothing in the pleadings or testimony which justified the court in giving any instruction as to the retention by the appellant of the materials furnished and the fruits of the work performed under the contract, and such being the fact the instruction in regard thereto had a tendency to mislead the jury. By it they must have been led to suppose that there was some duty on the part of the defendant to have returned the materials if it wished to avoid liability. It is true that the first part of the instruction, which required that the plaintiff should establish the fact that it had substantially done all that was required on its [375] part, was joined with what was said as to the retention of the materials by the conjunctive "and" instead of the disjunctive "or," and for that reason, in a technical sense, was perhaps not changed thereby to

the prejudice of appellants, yet we are not prepared to hold that the jury must necessarily have so construed it. They would be much more likely to take the instruction as a declaration by the court that there was a duty resting upon appellant to return the property, if it would escape liability on account thereof. They would not be likely to assume that what was said about the retention of the property was idle talk on the part of the court.

Beside, when construed in the light of the contract as defined by the court in another instruction, this one is technically incorrect, for the reason that by such other instruction the jury are told that if they find that the materials and work were furnished and performed as required by the contract, and that the work was completed, and was then found to be, or was in fact, in good working order, the plaintiff will be entitled to a verdict; from which it will be seen that the court recognized the fact that not only must the contract have been substantially complied with, but that in addition thereto the work must have been found to be in good working order. Hence, the instruction under consideration, investigated in the light of the other, would warrant the jury in concluding that under the law the retention of the materials by appellant would be equivalent to a finding that the plant was in good working order. The jury are told in one of the instructions that, if the work has been substantially performed and the plant found to be in good working order, the plaintiff is entitled to recover, and, in the one under consideration, that if the contract has been substantially performed and the materials retained the plaintiff is entitled to recover. From the two instructions the jury may well have understood 376 that if the contract had been substantially performed, and the benefits thereof retained, the plaintiff could recover regardless of the question as to the plant being found in good working order. Any other construction of the language used would make the two instructions inconsistent.

The next instruction complained of was in the following language: "If the jury believe and find from a preponderance of the evidence that the materials and work specified in the contract in suit were furnished and performed as required by the contract, and that work was completed and was then found to be, or was in fact, in good working order, then the plaintiff will be entitled to a verdict of the jury for the amount of the contract price specified in the contract,

even if the light produced at subsequent times by the operation of the lamps furnished under the contract was not equal to sixteen candle-power light from each lamp. The defendant is not entitled, under the issues raised upon the pleadings in this action, to any reduction or abatement from the contract price specified in the contract merely by reason of inferior quality of the light produced by the lamps furnished, at times subsequent to the completion of the work, if the jury believe and find from a preponderance of the evidence that at the time of the completion of the work it was found to be in good working order."

This instruction, in substance, told the jury that, if the contract had been substantially performed, and was at the moment of its completion found to be in good working order, the plaintiff could recover, even although events almost immediately succeeding the completion of the work conclusively established the fact that the result accomplished was not that contemplated by the contract. In so doing it construed that clause in the contract which provided that payments should not be made until the plant was found to be in good working order, to relate to its condition at the moment of completion. This was not a fair construction [377] of that clause in the contract. It was the evident contemplation of the parties that the work should not only be done as provided for therein, but that after it was done there should be reasonable opportunity given and time allowed to have it ascertained as a fact that the plant was found to be in such a condition as to fairly fulfill the object for which it was put in. The plaintiff occupied the position of an expert in determining what was necessary to make the plant perform the work required of it, and upon it was cast the responsibility, not only of putting in the material provided for in the contract, but also that of requiring the defendant to furnish such additional material as was necessary to make the plant reasonably fit for the use for which it was intended. The defendant did not profess any expert knowledge as to the plant to be put in, and relied entirely upon the plaintiff as to what was required. Under these circumstances the contract, when fairly construed, contemplated that there should be full opportunity by actual practical test to determine whether or not the plant was in good working order before the contract price therefor should be paid. This instruction did not put the matter to the jury in that light, and was therefore erroneous.

The next instruction as to which error is alleged is one in which the court instructed the jury that if they found for the plaintiff they might include interest. The claim of the plaintiff was for a definite, liquidated sum, and, from the time the action was brought, we think it would draw interest, and that the court properly so instructed the jury.

The other errors alleged grow out of the modification by the court of one of the instructions asked by the defendant, and of the refusal to give various other instructions asked by it. In modifying the instruction in reference to the services of an expert the court committed error. The contract contemplated the services of only one expert, and [378] the plaintiff was thereby in no manner authorized to put two experts to work on the job, and recover for their services at the contract price.

Some of the instructions asked by the appellant and refused by the court correctly stated the law, but the court, in other instructions given to the jury, substantially covered the same questions, and for that reason it was not reversible error to refuse to instruct in the language of the requests.

The judgment must be reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

FOREIGN CORPORATIONS—REGULATION OF.—A corporation of one state cannot do business in another without the latter's consent, express or implied. This consent may be accompanied with such conditions as the state may impose, so long as they are not repugnant to the constitution or laws of the United States, or the jurisdictional authority of the state, or do not enforce condemnation without opportunity for defense: *Commonwealth* v. *New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724, and note; *State* v. *Phipps*, 50 Kan. 609; 34 Am. St. Rep. 152, and note; extended notes to *State* v. *Goodwill*, 25 Am. St. Rep. 873; *Phœnix Ins. Co.* v. *Commonwealth*, 96 Am. Dec. 339; *Ducat* v. *Chicago*, 95 Am. Dec. 536, and *Western Union Tel. Co.* v. *Dickinson*, 13 Am. Rep. 299. See, also, *State* v. *Stone*, 118 Mo. 388; *ante*, p. 388, and note.

CONTRACTS—RETENTION OF BENEFITS.—The retention of manufactured articles upon which the manufacturer has performed labor and furnished a portion of the materials does not entitle him to recover the price agreed to be paid for the work, if it was not done in the manner stipulated for, and the articles proved valueless because of defects in their construction: *Mack* v. *Snell*, 140 N. Y. 193; 37 Am. St. Rep. 534, and note; and see, also, the note to *Catlin* v. *Tobias*, 84 Am. Dec. 188.

WOOD *v.* CASCADE FIRE AND MARINE INS. CO.

[8 WASHINGTON, 427.]

INSURANCE PROHIBITED BY THE LAWS OF A STATE.—If the laws of a state regulating the business of insurance therein declare that all insurance effected by foreign corporations which have not complied with such laws is unlawful, void, and of no effect whatever, a policy issued in violation of this rule is void not only in that state, but in every other, and hence no recovery can be had thereon in the state in which such corporation was organized.

INTEREST ON MONEY, after it is due, is recoverable as a matter of legal right.

Hughes, Hastings, and Stedman, for the appellant.

Fishback, Elder, and Hardin, for the respondents.

428 ANDERS, J. This action was brought by the respondents upon a fire insurance policy issued to them by the appellant, to recover the sum fifteen hundred dollars, the amount for which certain property was alleged to have been insured, and which was destroyed by fire.

The appellant is a corporation, organized under and by virtue of the laws of the territory (now state) of Washington, having its principal place of business at Seattle. The respondents, at the time of the alleged insurance and loss by fire, were residents of the city and state of New York, and the property insured was personal property then in the said city and state.

The sufficiency of the complaint does not appear to be questioned. But the defendant, appellant here, as an affirmative defense to the action, pleaded that the defendant was a corporation organized under the laws of the territory of Washington, and that the policy of insurance sued upon, a copy of which is set forth in the plaintiffs' complaint, was procured from one Lithgow by one William Warbeck, an insurance broker of the city and state of New York, and was, on or about the first day of November, 1890, issued to the plaintiffs, who were at that time, and at all times since, residents of the state of New York, and described property then and at all times thereafter situated in the city of New York. That the legislature of the state of New York had enacted certain general laws regulating the business of insurance in said state, and providing when and upon what conditions insurance companies organized under the laws of other states might issue policies of insurance upon property in said state, and might be entitled 429 to transact insurance business

therein, and provided that it should be unlawful for any such insurance company to transact any business of insurance whatever until said laws had first been complied with. That the legislature of the state of New York had enacted a law for the further regulation of the business of insurance in said state, amendatory of the laws theretofore in force, which law, among other things, declared that any policies of insurance issued by companies not having complied with the requirements of the general insurance laws of said state, should be void and of no force or effect whatever, which law was approved May 23, 1884, and amended by chapter 113 of the laws of 1885 of said state, approved April 7, 1885, and further amended by chapter 552 of the laws of 1890, approved June 7, 1890. That the aforesaid laws were in force in said state of New York at and prior to the first day of November, 1890, and still continue to be in force in said state, and that the defendant had never at any time, nor in any manner, complied with the provisions of the aforesaid laws of said state of New York, and had never at any time been licensed or empowered to take any risks or to issue any policies of insurance on property situated in the said state of New York, or to residents thereof, or to transact any business whatever authorized by its charter within the said state of New York, and has never had the capital required by the provisions of the aforesaid laws, and that the pretended policy of insurance sued on was issued, delivered, and received in violation of the said laws of the state of New York, and was not procured in the manner in said laws provided or authorized. Copies of the laws referred to were attached to and made a part of said answer.

The plaintiffs interposed a demurrer to this affirmative matter, upon the ground that the facts therein stated did not constitute a defense to plaintiffs' cause of action. This demurrer was sustained by the trial court, and the ruling [430] of the court thereon is the principal ground of error relied on for reversal of the judgment appealed from.

For the purposes of the demurrer all of the facts well pleaded in the answer must be admitted. The question, therefore, to be determined is whether the facts pleaded therein, and thus admitted, show that the contract of insurance, as evidenced by the policy sued on, was made in New York. If it was made there it is there illegal and void, because it is in contravention of the statutes of that state.

And if it is invalid there it is invalid everywhere (*Hyde* v. *Goodnow*, 3 N. Y. 267; *Lamb* v. *Bowser*, 7 Biss. 315), and cannot be enforced here.

The policy itself, as set forth in the complaint, purports to have been executed by the president and secretary of the company, and by J. W. Lithgow, general agent, and countersigned at Chicago, Illinois, on October 28, 1890. The presumption is, there being nothing to show to the contrary, that the policy is valid if made either in Chicago or Seattle, the home of the company. And this presumption can only be overcome in this instance by averments of facts showing that it was made, or first became operative, in the state of New York. It must be conceded that the allegations in the affirmative defense as to where the contract was executed are not as specific and certain as they might have been made, yet, for the purposes of this demurrer, we think that, aided as they are by reference to the statutes, they sufficiently indicate that the contract of insurance was not completed until the policy was delivered and accepted in New York.

By an act of the legislature of that state, approved June 7, 1890, which is an amendment of former laws on the same subject, it is provided that: "Any person acting for himself or for others, who solicits or procures policies or certificates for or from any company or association that has not complied with this [421] act, or who in any manner aids such transaction, shall be held guilty of a misdemeanor. *Provided*, however, that the superintendent of the insurance department shall be authorized to issue to citizens of this state, in consideration of the yearly payment of two hundred dollars, a license, which shall be subject to revocation at any time, to act as agent or agents and procure policies of fire insurance for themselves or others on property in this state in companies which have not complied with the laws of this state. It is further provided that all fire insurance policies issued to residents of this state on property located herein, by companies that have not complied with the requirements of the general insurance laws of the state, shall be null and void, and of no force or effect whatever, except such as have been procured in the manner in this act provided."

As we have shown above, the answer avers, in effect, that the policy of insurance in question was issued, delivered, and received in violation of the above-quoted statute and others, and was not procured in the manner in said laws provided or

authorized. This, we think, is saying in substance that the contract was executed in New York, and was not procured by a duly licensed broker in that state. And this being so, it follows that the demurrer ought to have been overruled. Of course, we are not called upon to express any opinion as to the merits of this case, and do not do so. We simply decide the question raised by the pleadings, which is purely a question of law. If, as a matter of fact, the insurance was effected in New York by a licensed broker, it is valid even in that state; and if the contract was really executed elsewhere its validity will not, as we have before stated, be determined by the laws of New York.

Appellant's second objection that the judgment is excessive in that it included interest on the amount found due from the time the same became payable, in our opinion, is without merit. Interest on money detained after it is due and payable is recoverable as matter of legal right: 1 Sutherland on Damages, 2d ed., 634.

[422] The judgment is reversed, and the cause remanded with directions to overrule the demurrer to the defendant's affirmative defense.

DUNBAR, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

FOREIGN INSURANCE COMPANIES—STATE REGULATION—EFFECT ON CONTRACT OF FAILURE TO COMPLY WITH.—Where a contract of insurance was made with a resident of New Hampshire, and upon property situated there by a Massachusetts company, which had not complied in New Hampshire with the requirements imposed by law, it was held that an action upon a premium note could not be maintained, as the contract of insurance was invalid: *Haverhill Ins. Co.* v. *Prescott*, 42 N. H. 547; 80 Am. Dec. 123, and note. To the same effect, see *Cincinnati etc. Assur. Co.* v. *Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626. But in *Connecticut etc. Ins. Co.* v. *Way*, 62 N. H. 622, it was held that a foreign insurance company could recover in an action on a premium note given as the consideration for a contract of insurance upon property in that state, made and to be performed in the state where the company was domiciled, although it had not complied with the laws of New Hampshire. As to whether contracts of insurance made under such circumstances would be binding upon the company making them, see *Pennypacker* v. *Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395.

INTEREST—ALLOWANCE ON DEBTS.—Interest is allowable, as a matter of law and right, upon a debt from the time whereby the contract is payable, unless the parties agree otherwise: *Henderson etc. Mfg. Co.* v. *Lowell Machine Shops*, 86 Ky. 668; *Durfee* v. *O'Brien*, 16 R. I. 213; *Washington* v. *Planters' Bank*, 1 How. (Miss.) 230; 28 Am. Dec. 333. See, also, the extended note to *Selleck* v. *French*, 6 Am. Dec. 189, and *Van Rensselaer* v. *Jewett*, 51 Am. Dec. 278.

BOOTH *v.* PHELPS.

[8 WASHINGTON, 549.]

TAXATION—PERSONAL PROPERTY, WHAT SUBJECT TO.—A SET OF ABSTRACT BOOKS containing information largely in the form of abbreviations and cipher, understood by five persons only, is personal property having a value, and therefore subject to taxation.

Relfe and Brinker, for the appellant.

John F. Miller and A. G. McBride, for the respondent.

549 SCOTT, J. This was a suit to enjoin the selling of a certain set of abstract books belonging to appellant for state and county taxes. At the close of appellant's case the court granted a motion for nonsuit, from which judgment this appeal was taken.

The constitution provides that "the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money": Const., art. 7, sec. 2.

An act of the legislature, Laws 1889–90, page 530, section 1, provides that "all real and personal property in this state, and all personal property of persons residing therein, the property 550 of corporations now existing, or hereafter created, except such as is hereinafter expressly excepted, is subject to taxation."

And the only question involved in this case is whether a set of abstract books is included within the term "personal property," for the purposes of taxation. The proof shows that the information contained in the books is largely in the form of abbreviations and cipher peculiar to that particular set of books, and only five persons understood them, as far as was known to the manager and secretary of the company, that no information could be derived from the books except by an expert in that line of business, and that it would be necessary for him to understand such abbreviations and cipher.

It is contended that the books were of no value to the public or to any one who did not understand them; that while the books originally in blank form were of some value, the fact that they contained such writings had destroyed this value even, and that they are not assessable for the purpose of taxation. There was some proof, however, to show that certain maps connected with the business had a general value to the extent perhaps of a hundred dollars.

We are of the opinion that the property was subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value in a general sense, but would not deprive them of all taxable value. If the property was assessed at too high a figure it would be no ground for issuing a writ of injunction. Another remedy is provided therefor.

There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto: See *Leon Loan etc. Co.* v. *Equalization Board*, 86 Iowa, 127; and that [851] the peculiar circumstances of this case do not except it from said rule.

Affirmed.

DUNBAR, C. J., and ANDERS, HOYT, and STILES, JJ., concur.

TAXES ON ABSTRACT BOOKS.—Books of abstracts of title have no intrinsic value, and are only valuable for the information they contain conveyed by consultation or extracts; hence they are not subject to taxation: *Perry* v. *City of Big Rapids*, 67 Mich. 146; 11 Am. St. Rep. 570.

McEACHERN *v.* BRACKETT.

[8 WASHINGTON, 852.]

LACHES.—A SUIT IN EQUITY TO SET ASIDE A DECREE FORECLOSING A MORTGAGE for want of jurisdiction and to be permitted to pay the mortgage debt, though brought five years after such foreclosure, is not abated by the laches of the complainant, though he paid no taxes on the property in the mean time and took no proceedings to ascertain whether the mortgage had been foreclosed, or to pay the indebtedness or the interest accruing thereon, if, as a matter of fact, he had no notice of the suit to foreclose, and the mortgage provided that the taxes might be paid by the mortgagee and then recovered as part of the mortgage debt.

A JUDGMENT PROCURED BY THE UNAUTHORIZED APPEARANCE OF AN ATTORNEY, and a foreclosure sale based thereon, will be vacated in equity though the defendant had no defense to the action, if he offers to pay the amount of the mortgage debt and interest. He is not confined to his remedy against the attorney though the latter is solvent.

JUDICIAL SALES.—A PLAINTIFF IS NOT AN INNOCENT PURCHASER at a foreclosure sale, when he knows he has not served defendant with process and that the appearance of the defendant has been entered by an attorney. The judgment and sale will therefore be vacated in equity if such appearance is proved to have been unauthorized.

APPELLATE PROCEDURE.—THOUGH THE AFFIDAVIT OF A SURETY ON AN APPEAL BOND DOES not, as the statute requires, affirm that his prop-

erty is within the state, and the statute declares that an appeal bond the affidavit of which does not comply with such statute, "shall be of no force," yet the bond will be treated as sufficient to support the appeal if no objection is taken to it in the court in which it is filed.

Pratt and White, for the appellant.

Blaine and De Vries, and Smith and Littell, for the respondents.

652 Stiles, J. Appellant, in 1883, bought from respondent Brackett a parcel of land in King county at the price of six hundred and fifty dollars, of which sum three hundred dollars was paid by note secured by mortgage, and the balance in cash. The note and mortgage were transferred twice, so that respondent Brautigam was the holder thereof in August, 1884, and respondents 653 Phinney and Leary were indorser for value and accommodation indorser, respectively. At the date last mentioned, which was after the maturity of the note, Brautigam commenced a foreclosure action, making appellant and the other respondents above named defendants. All of the defendants in that action, except the appellant here, were served with the summons personally. The sheriff returned that appellant could not be found in his (King) county, and no further attempt to make service upon him was made. September 8, 1884, certain qualified attorneys filed a general demurrer for "the defendants," which bears upon its face the words, "Overruled, Greene, J.," without date. On the 15th of September, Brackett filed an answer by a different attorney, and on December 20th following, the default of the other three defendants was entered for want of an answer. After a reference a decree of foreclosure was entered, and in due course the property was sold by the sheriff to Brautigam for three hundred dollars, which left a deficiency of one hundred and seventy-three dollars and eighty-nine cents, which Phinney and Leary paid. After receiving his deed Brautigam conveyed the property to respondent Nicholai.

Appellant, in November, 1890, brought this action to set aside the decree of foreclosure and avoid the subsequent conveyances on the ground that he never had any knowledge of the foreclosure proceedings, or of any of the steps taken in consequence thereof, and that the filing of the demurrer by attorneys assuming to represent the defendants was without his knowledge or authority. The complaint made tender of

a sum of money in payment of the mortgage debt, which sum was deposited with the clerk, and the sufficiency of the amount whereof is not attacked. The court below found all the facts to be substantially as alleged in the complaint, and particularly that the filing of the demurrer was without any authority from appellant. These findings the respondents criticise; but [654] we think they are fully sustained both by the direct testimony and the surrounding circumstances, and shall not disturb them. The ninth finding was against appellant, and as it was probably the basis of the court's action, we quote it in full as far as it applies, viz:

"9. That from the time when said note and mortgage became due, to wit, the sixth day of May, 1884, until about a month before the commencement of this present suit, to wit, May 15, 1889, the plaintiff herein, said A. E. McEachern, paid no attention whatsoever to said property, nor did he make any inquiries as to what, if any thing, had been done with said note and mortgage, and that he never paid any taxes on the said property, nor in any manner exercised any acts of ownership therein; and that the taxes on the same have been paid during all said time by the defendant, John C. Brautigam. That during the fall of 1884 and the time prior to the commencement of this action the plaintiff herein had the ability to pay and discharge said note and mortgage, and that he could have arranged for the payment of said note and mortgage at any time from said date to the commencement of this action; that during most of the time from the date of the purchase of said property until the commencement of this action the plaintiff was in the vicinity of Edison, Skagit county, Washington, and was in the city of Seattle at least six times in the year 1884, the year when said note and mortgage matured."

Upon these facts the court adjudged appellant chargeable with such laches as ought to deprive him of the relief sought, and held his case to be without equity.

It will be observed that the two matters found to constitute laches were the nonpayment of taxes and the nonpayment of the note, though the appellant possessed the ability to pay, and resided in a neighboring county. But neither of these matters seems to us sufficient to justify a refusal to set aside a judgment entered without jurisdiction, where the party against whom the judgment was entered had no notice either of the judgment or that any one was claiming [655] his

land. The mortgage provided for the addition of any taxes paid by the mortgagee to the sum recoverable upon foreclosure; and as to the note, the law charges nothing except interest as a penalty for the nonpayment of such overdue obligations. The land does not appear from the record to have been in the actual occupancy of any one, and therefore required no attention. No amount of attention would have disclosed the fact that a foreclosure had taken place; and there is no rule of law which requires a mortgagor in arrears to keep watch of the court records to see whether a judgment has been entered up against him without his knowledge.

Passing this point, we come next to the main question discussed by counsel, viz., the effect of a judgment rendered against a party not served with process, but in whose behalf an unauthorized attorney appears or pleads. Appellant claims that such a judgment is voidable when directly attacked, as in this case; while respondents maintain that it is invulnerable, the party's remedy being an action for damages against the attorney unless he is shown to be insolvent; or that it must stand as against an innocent third party; or that there can be no relief unless a good defense is shown in connection with the application for relief.

A judgment of this kind is void in fact, although the appearance of an attorney is presumed to be authorized, so that the face of the record shows no defect other than the want of actual service; and it will be set aside as a nullity, although innocent third parties may suffer, when the application for relief is made promptly upon discovery of the existence of the judgment, and upon clear and convincing proof that the attorney did not have authority to appear: *Harshey* v. *Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Newcomb* v. *Dewey*, 27 Iowa, 381; *Great West Mining Co.* v. *Woodmas etc. Mining Co.*, 12 Col. 46; 13 Am. St. Rep. 204; *Shelton* v. *Tiffin*, 6 How. 163; *Williams* v. *Neth*, 4 Dak. 360, and note; [656] *Arno* v. *Wayne Circuit Judge*, 42 Mich. 362; *Mutual Life Ins. Co.* v. *Pinner*, 43 N. J. Eq. 52; *Glass* v. *Smith*, 66 Tex. 548; *Anderson* v. *Hawhe*, 115 Ill. 33; *First Nat. Bank* v. *William B. Grimes etc. Co.*, 45 Kan. 510; *Stocking* v. *Hanson*, 35 Minn. 207; *Garrison* v. *McGowan*, 48 Cal. 592; *Bayley* v. *Buckland*, 16 L. J. Ex. 204; Mechem on Agency, sec. 810.

The principal authority to the effect that the remedy is against the attorney only, when he is solvent, is found in New York, where, since *Denton* v. *Noyes*, 6 Johns. 297, 5 Am.

Dec. 237, that has been the rule. But the decision of the court of appeals of that state in the recent case of *Vilas* v. *Plattsburgh etc. R. R. Co.*, 123 N. Y. 440, while it followed what was conceded to be the settled law of the state, showed a disposition on the part of the court to restrict the rule to the most meager limits, and gave it only the coldest approval.

The rule as to showing a meritorious defense has no application in a case of this kind, where the applicant for relief does not seek to be discharged from the burden of his obligation, but merely asks that his property, which was taken from him without any process of law of which he had notice, be returned to him upon his satisfaction of the just lien created by the mortgage. Were it not that the statute of limitations would now bar a suit for foreclosure, equity would not demand a tender in order to procure the avoidance of the judgment; the court would simply clear its record of that which had been entered there without jurisdiction, although formally regular.

It frequently happens that courts have to decide between two innocent parties to the disadvantage of one or the other, and it may be so here. Brautigam, the plaintiff in the foreclosure suit, and the purchaser at the sale, was not an innocent purchaser. He knew he had not served appellant, [657] and in taking his judgment upon the voluntary and unquestioned appearance of attorneys he took the risk that that appearance might be unauthorized. As was said in *Bayley* v. *Buckland*, 16 L. J. Ex. 204: "The plaintiff in such a case is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant, therefore, is wholly free from blame, and the plaintiff is not."

If he was misled by the attorney he has his remedy Again, one cannot claim to have been an innocent purchaser in any case where he was the judgment creditor under whose execution the property was sold. The judgment-roll disclosed the want of service and the voluntary appearance, and was information to all purchasers of the title from Brautigam of the infirmity that might exist therein, even if notice of the infirmity were necessary.

Respondents Leary and Kinnear having been voluntarily dismissed in the superior court, should not have been included in the notice of appeal. Having been so included,

upon the appellant's confession they are entitled to costs of their motion for dismissal here.

We find no internal evidence that the statement of facts does not contain all that the act of 1891 required in equity cases. From the brief and argument we gather that there was a contest before the court as to whether the statement should contain the actual testimony, or the reporter's shorthand notes of the trial, including colloquies between counsel, etc. Fortunately, the best counsel prevailed, and we have a record of the case, and nothing else. The judge took the proposed statement and the proposed amendments under advisement, and, after consideration, determined to certify, and did certify, the former as the statement. Some confusion of dates occurred in this connection; but there [658] was nothing which rendered the proceeding subject to a motion to strike or dismiss.

A motion is made to dismiss because the surety on the appeal bond did not include in his affidavit the statement that his property was in this state. This matter should have been addressed to the superior court upon an exception to the sufficiency of the surety, and not have been permitted to lie dormant until it was too late for appellant to have the affidavit corrected or furnish a new bond. Section 10 of the appeal act of 1893 (Laws 1893, p. 124) is very blunt in its statement that an appeal bond "shall be of no force" unless the affidavit shows certain things; but as the affidavit is not conclusive of any thing stated in it, so we think it was not meant that a bond wanting in some of the particulars mentioned should be absolutely void. Probably if the judgment had been affirmed respondents would have been ready enough to maintain it as a binding obligation. The construction is, we think, that such a bond is merely open to objection to be taken in the manner provided in section 11; and no such objection having been made, the defect was waived.

The judgment will be reversed, and the cause remanded for a new judgment in accordance with the prayer of the complaint.

Dunbar, C. J., and Anders, J., concur.

Hoyt and Scott, JJ., dissent.

Judgments upon an Unauthorized appearance of an attorney will be set aside upon motion: *Corbitt* v. *Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586, and note. All sales or other proceedings based upon a judgment

secured through the unauthorized appearance of an attorney are as to all persons irrespective of notice or *bona fides* absolute nullities: *Great West Min. Co.* v. *Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204, and note. See the extended note to *Burton* v. *Lyford*, 75 Am. Dec. 146.

JUDGMENTS—SETTING ASIDE—LACHES AS A BAR TO—NOTICE.—One is guilty of laches, and cannot maintain an equitable action to cancel a sheriff's deed to his land executed under a voidable judgment, when he has waited eleven years to begin his action, during which time the courts were open to him, and he was chargeable with notice of the deed: *Wale* v. *Hankins*, 68 Tex. 418; 2 Am. St. Rep. 501, and note. See further on this point, *Viles* v. *Plattsburgh etc. R. R. Co.*, 123 N. Y. 440; 20 Am. St. Rep. 771. But to constitute laches there must have been knowledge, actual or imputable, of the facts which would have prompted a choice either to diligently seek relief or thereafter to be content with such remedies as a court of law might afford, or, if there was actual ignorance, it must have been without just excuse: *Bausman* v. *Kelly*, 38 Minn. 197; 8 Am. St. Rep. 661. See the extended notes to *Bell* v. *Hudson*, 2 Am. St. Rep. 798, and *Burnham* v. *Hays*, 58 Am. Dec. 393.

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ACCESSARIES.

1. EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE.—A state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime against his confederate, whether the latter is convicted or not. If his testimony is corrupt or his disclosures only partial he forfeits his rights under the contract. *Camron* v. *State*, 763.
2. EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE—PRACTICE THEREUNDER.—When a valid agreement to turn state's evidence has been made, and defendant has testified thereunder in good faith, upon the refusal of the prosecuting attorney to recognize the agreement, the court generally continues the case to let the defendant obtain a pardon to plead in bar, but this cannot be done in Texas, as the pardoning power can be invoked only after conviction, and in such case the cause should be dismissed and a *nolle prosequi* entered. *Camron* v. *State*, 763.
3. EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE—PRACTICE.—When a defendant in good faith carries out his agreement with the state to turn state's evidence in consideration of exemption from prosecution, and the prosecuting attorney then refuses to recognize the agreement, the court should *nolle prosequi* and dismiss the prosecution, incorporating in the judgment the reasons therefor, which remains a perpetual record of self-confessed guilt. *Camron* v. *State*, 763.
4. EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE AS DEFENSE—PRACTICE.—When a defendant sets up in defense of his prosecution a valid contract between him and the state to turn state's evidence in consideration of exemption from prosecution, fully performed in good faith on his part, and such defense is not denied by the state, the court should dismiss the case, incorporating in the judgment the reasons therefor. To sustain a demurrer to such defense in such case is reversible error. *Camron* v. *State*, 763.
5. EVIDENCE—AGREEMENTS TO TURN STATE'S EVIDENCE AS DEFENSE—PRACTICE.—When a defendant pleads, in defense to his prosecution, that he has in good faith performed his agreement with the state to turn state's evidence, in consideration of exemption from prosecution, his plea is wholly for the consideration of the court as to whether the case

should be *nolle prossed* or dismissed, and is not a special plea in bar which must be submitted to and passed upon by the jury. *Cannon* v. *State*, 763.

ACCIDENT.

See EVIDENCE, 2.

ACCOMPLICES.

See ACCESSARIES; BURGLARY, 5; CONSPIRACY, 2, 5.

ACCOUNTING.

See LIMITATIONS OF ACTIONS, 4; PARTNERSHIP, 9.

ACKNOWLEDGMENTS.

1. CONCLUSIVENESS.—An officer's certificate of acknowledgment of a mortgage is conclusive as to the matters therein contained except for fraud in the party benefited, or mistake by the officer, or in direct proceedings against the officer or his sureties. *Davis* v. *Jenkins*, 197.
2. A MARRIED WOMAN MAY IMPEACH A CERTIFICATE THAT SHE ACKNOWLEDGED A DEED, by proving that she did not in fact appear before the officer certifying such acknowledgment nor otherwise acknowledge such deed, and that it was never delivered by her or with her consent. *Le Mesnager* v. *Hamilton*, 81.

See DEEDS, 5; ESTOPPEL, 2; EVIDENCE, 8.

ACTIONS.

See CONTRACTS, 4, 6, 11; LIS PENDENS.

ADMIRALTY.

1. THE JUDGMENT OF A FOREIGN VICE-ADMIRALTY COURT purporting to dispose of the surplus proceeds of a wrecked vessel ordered to be sold by such court, remaining after paying an award of salvage moneys to the salvors, whereby such surplus was directed to be paid to a claimant thereof, is void as against other claimants who have not had any notice of the claim made to such fund nor any opportunity to contest such claim. *China etc. Ins. Co.* v. *Force*, 576.
2. A DECREE OF A FOREIGN VICE-ADMIRALTY COURT DISPOSING of the surplus proceeds of the sale of a vessel made *ex parte* upon a petitioner's statement, and without any notice to adverse claimants, is, as against the latter, void, and cannot defeat a proceeding brought to recover such proceeds from the claimant to whom they were paid under and by virtue of such decree. *China etc. Ins. Co.* v. *Force*, 576.
3. AN ADMIRALTY COURT HAVING JURISDICTION TO ORDER THE SALE OF A VESSEL and the payment of the claims of salvors has not, by virtue of its seizure and possession of such vessel, jurisdiction to determine claims to the surplus proceeds of the vessel, but before it can dispose of such proceeds must give due notice to adverse parties. If it allows claims to be paid before the legal right of the claimant is established by due process of law, it is nothing less than allowing a man's property to be taken from him without his consent and without the judgment of the law. *China etc. Ins. Co.* v. *Force*, 576.

ADULTERATION.

MUNICIPAL CORPORATIONS—ORDINANCES REGULATING ADULTERATION OF FOOD OR DRINK.—Under a charter authorising a city to prohibit the adulteration of drinks, it may by ordinance adopt a legal standard of adulteration, so long as such standard is not unreasonable or arbitrary, or passes beyond a fair measure for the correction of the evil sought to be guarded against; and the operation of such ordinance is not suspended by the fact that a state law makes the adulteration of drinks an offense. *State* v. *Fourcade*, 249.

ADULTERY.

See CRIMINAL LAW.

ADVANCEMENTS.

1. PRESUMPTION—EVIDENCE.—Advancements indicate something given in anticipation of what a beneficiary may succeed to by inheritance, succession, or gift, at the death of the donor, and are presumptively a satisfaction *pro tanto* or in the whole of ulterior benefits. This presumption is liable to be fortified or rebutted by extraneous evidence. *Hattersley* v. *Bissett*, 532.

2. PRESUMPTIONS.—CONVEYANCES OF LAND BY PARENT TO CHILD for a consideration named therein of natural love and affection, or for a nominal valuable consideration, are presumptively an advancement. This presumption may be overcome by extrinsic evidence. *Hattersley* v. *Bissett*, 532.

3. PRESUMPTION—PROOF TO REBUT.—The presumption that a conveyance of land made by a parent to his daughter for a nominal consideration and natural love and affection is made by way of advancement is overcome by proof that such conveyance was made as compensation to the daughter, for services rendered in taking care of and nursing the grantor during a number of years. *Hattersley* v. *Bissett*, 532.

AFFIDAVITS.

See APPEAL, 7; ATTACHMENT, 8, 9; EVIDENCE, 6; JUDGMENTS, 1; TRIAL, 5, 6.

AGENCY.

1. EXTENT OF AUTHORITY.—A formal instrument conferring authority upon an agent is strictly construed, and can be held to include only the powers expressly given, and such others as are necessary and essential to carry into effect those which are expressed. *Harris* v. *Johnston*, 312.

2. ACTS OF AGENT, WHEN BINDING.—An act of an agent within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages, and is subject to its liabilities. *Destrehan* v. *Louisiana etc. Lumber Co.*, 265.

3. POWER TO BIND PRINCIPAL JOINTLY WITH OTHERS.—The authority vested in an agent to bind his principal by a negotiable instrument, unless otherwise expressed, is authority to bind him separately, and not conjointly with another; in other words, power to an agent to act for his principal, in the absence of any thing to show a different intention, must be construed as giving authority to act in the separate individual business of his principal only. *Harris* v. *Johnston*, 312.

4. POWER OF ATTORNEY—CONSTRUCTION.—Several and separate powers of attorney executed by each of several cotenants authorizing an agent to sell and execute warranty deeds of each cotenant's interest in the common property, and to "sell and indorse any promissory notes that may be taken and secured by mortgage," do not authorize such agent to bind either of his principals as indorser, jointly with the other cotenants, of a note taken payable jointly to them all. *Harris* v. *Johnston*, 312.

See CORPORATIONS, 23, 27, 29, 30; INSURANCE, 2, 9–12; MASTER AND SERVANT, 5; NEGOTIABLE INSTRUMENTS, 6; PARTNERSHIP, 10.

AIDING AND ABETTING.

See HOMICIDE, 1.

ALIMONY.

See MARRIAGE AND DIVORCE, 7, 8.

ANIMALS.

See LARCENY, 1, 3.

APPEAL.

1. If an objection to evidence is made in the trial court on a designated ground and there sustained, the action of the court can be supported on appeal by showing that the evidence was inadmissible on another ground and might have been excluded because of a defect in the defendants' answer, when the trial apparently proceeded on the assumption that such answer was sufficient. *Le Mesnager* v. *Hamilton*, 81.

2. FORGERY.—An objection taken in the lower court to the admission in evidence of a check upon which a charge of forgery is based, because it is fatally variant from that alleged in the indictment, cannot be considered on appeal, although the check is incorporated in the record, if it is not certified by the clerk, nor in any way identified as the original check. *Brewer* v. *State*, 760.

3. IMMATERIAL ERROR.—Error cannot be predicated upon the admission of immaterial testimony in a case tried by the court without a jury when the evidence otherwise justifies the findings and judgment. *Dewey* v. *Allgire*, 468.

4. DYING DECLARATIONS—EFFECT OF IMPROPERLY ADMITTING.—A conviction must be set aside when dying declarations upon which it is probably based are improperly admitted in evidence, although other evidence tends to establish guilt, as it cannot be determined how much such declarations may have influenced either the verdict or the punishment assessed. *State* v. *Johnson*, 405.

5. DYING DECLARATIONS.—PROPRIETY OF ADMITTING dying declarations is a preliminary question for the determination of the court before they are allowed to go to the jury; but if they are improperly permitted to go to the jury the error can be corrected on appeal. *State* v. *Johnson*, 405.

6. SEDUCTION—OBJECTIONABLE REMARKS BY COUNSEL.—In a prosecution for seduction, the fact that the prosecuting attorney makes objectionable remarks outside the record in his argument is not reversible error if the court at the time stopped and rebuked him, directing him to confine his remarks to the record and the facts in proof. *State* v. *Brandenburg*, 362.

7. THOUGH THE AFFIDAVIT OF A SURETY ON AN APPEAL BOND DOES not, as the statute requires, affirm that his property is within the state, and the statute declares that an appeal bond the affidavit of which does not comply with such statute, "shall be of no force," yet the bond will be treated as sufficient to support the appeal if no objection is taken to it in the court in which it is filed. *McEachern* v. *Brackett*, 922.

8. THE FAILURE TO GIVE AN INSTRUCTION WHEN NO REQUEST is made for it is not error. *McDonald* v. *International etc. Ry. Co.*, 803.

See ACCESSARIES, 4; CONTRACTS, 7; COURTS; HABEAS CORPUS, 1, 2; NEW TRIAL.

APPEAL BOND.

See APPEAL, 7.

ARBITRATION.

See INSURANCE, 4.

ARREST.

See EXTRADITION, 3.

ASSIGNMENT.

PUBLIC OFFICERS—ASSIGNMENT OF, OR A LIEN UPON, SALARIES OR FEES OF. It is contrary to public policy for an officer to assign or give a lien upon his unearned compensation, whether it be salary or fees, and any such assignment or lien will be treated as void. *National Bank* v. *Fink*, 833.

See ATTACHMENT, 2, 3; CHECKS, 6; CORPORATIONS, 6; OFFICERS, 1, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. INSOLVENCY—ASSIGNMENT—VALIDITY OF—CONFLICT OF LAWS.—A voluntary assignment in insolvency for the benefit of creditors, if valid where made, is valid everywhere unless repugnant to the law of the place where property of the insolvent is situated, and detrimental to the rights of domestic creditors in the latter jurisdiction, and gives to the domestic court jurisdiction to prevent unlawful preferences with respect to property in another jurisdiction when such preference is sought to be obtained by resort to the courts where the property is situated. *Hayden* v. *Yale*, 232.

2. INSOLVENCY—ASSIGNMENT—CONFLICT OF LAWS—INJUNCTION.—When a citizen of one state makes a voluntary assignment in insolvency for the benefit of creditors, including real estate situated in another state, the courts of the state of his residence have jurisdiction by injunction or otherwise, to prevent a domestic creditor from defeating the effect of the assignment and obtaining a preference over other domestic creditors in relation to such real estate. If the creditor, subsequently to the assignment, attaches and advertises such realty for sale under a judgment recovered in the state where it is situated, and assigns his judgment to a resident of that state, the domestic court may either enjoin the sale, or, if it is made, hold the creditor liable to the other creditors for its proceeds. *Hayden* v. *Yale*, 232.

See DURESS; INSOLVENCY.

ASSOCIATIONS.

See CHARITIES, 3; CONTRACTS, 9, 10, 12.

ATTACHMENT.

1. GARNISHMENT IS AN ATTACHMENT by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim. *American etc. Ins. Co.* v. *Hettler*, 522.

2. EXEMPTIONS—WAGES—GARNISHMENT—CONFLICT OF LAWS.—An assignee of a claim against a resident of one state employed by a railway company operating its road through that and another state, to a resident of the latter state, for the purpose of obtaining, by garnishing the company in the latter state, wages due the debtor and exempt by the law of the former state, and so obtained, is liable to the debtor in the state of his residence for the amount so appropriated without his consent. *O'Connor* v. *Walter*, 486.

3. EXEMPTIONS—GARNISHMENT—CONFLICT OF LAWS—ESTOPPEL.—A judgment in one state garnishing exempt wages of a resident of another state in favor of an assignee of the claim does not estop the debtor from bringing an action in the latter state against the assignor to recover the amount of such judgment. *O'Connor* v. *Walter*, 486.

4. GARNISHMENT IN ANOTHER STATE—JURISDICTION.—Garnishment proceedings must be instituted in the state where the debt is payable, or the property is to be delivered, and a garnishment in one state of a debt due and payable in another is void. *American etc. Ins. Co.* v. *Hettler*, 522.

5. GARNISHMENT IN ANOTHER STATE—JURISDICTION.—An insurance company indebted for a loss payable in one state cannot be garnished in another, where it has no money or property of the debtor within the jurisdiction of the court. *American etc. Ins. Co.* v. *Hettler*, 522.

6. GARNISHMENT—JURISDICTION.—To subject money or property to garnishment it must be within the jurisdiction of the court. *American etc. Ins. Co.* v. *Hettler*, 522.

7. EXEMPTIONS—PENSION MONEY.—Attachment does not lie against the proceeds of a pension check deposited by the pensioner with a bank for collection, and by it collected and placed to his credit as a deposit. *Reif* v. *Mack*, 720.

8. AN ATTACHMENT BASED UPON A PAPER HAVING THE FORM OF AN AFFIDAVIT, except that it does not appear either upon its face nor by extrinsic evidence to have been sworn to by any officer, is absolutely void, and a judgment based thereon, in a case in which there was no personal service of summons, is equally void. *Tacoma Grocery Co.* v. *Draham*, 907.

9. TELEPHONE, COMMUNICATIONS BY, NECESSITY OF IDENTIFICATION.—If an affidavit in support of an attachment is made by an attorney for the plaintiff upon information and belief, and states that such information and belief are based upon the statement of the plaintiff and his attorney at another place, "where they both talked to affiant this morning, over the telephone, and narrated the facts to deponent exactly as they have been set forth in the complaint," such affidavit is not sufficient to support an attachment issued thereon, unless it further appears that the affiant was

acquainted with the plaintiff, and recognized his voice, or otherwise knew it was the plaintiff who was talking. *Murphy* v. *Jack*, 590.

See CHATTEL MORTGAGES, 1.

ATTORNEY AND CLIENT.

1. ATTORNEYS AT LAW.—UPON THE DEATH OF ANY MEMBER OF A PARTNERSHIP OF ATTORNEYS at law the client may elect to consider the employment as terminated on the ground that the contract was for the personal services of all the members of the firm, but the option of terminating the contract for such a cause is with the client alone, and the surviving partners are bound to proceed, unless the client elects that they shall not do so. *Little* v. *Caldwell*, 89.

2. FEES—CONSIDERATIONS AFFECTING.—The importance and results of a case in which an attorney is engaged, as well as the actual time consumed in the conduct of the suit, must be considered in determining the value of his professional services to his client. *Selover* v. *Bryant*, 349.

See ATTACHMENT, 9; EXECUTORS AND ADMINISTRATORS, 1; PARTNERSHIP, 5–8.

BAIL.

RECOGNIZANCE, WHEN MAY BE DECLARED FORFEITED.—A recognizance conditioned that the accused shall appear and answer an accusation made against him and abide the order of the court, given under a statute declaring that if the accused fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited, the forfeiture may be made at any time during the term and after, as well as before, a verdict against him. *Neininger* v. *State*, 674.

BANKS.

1. A DEPOSIT IN A BANK IS PRESUMED TO BE GENERAL in the absence of averment or proof to the contrary. *Bank* v. *Windisch-Muhlhauser Brewing Co.*, 660.

2. MONEYS RECEIVED ON GENERAL DEPOSIT and commingled with other moneys of the bank become its property, and the relation between it and the depositor is essentially that of debtor and creditor. *Bank* v. *Windisch-Muhlhauser Brewing Co.*, 660.

3. SETOFF.—A BANK HOLDING A DEPOSITOR'S NOTE PAST DUE is entitled to set it off against the amount due him upon his deposit account, and is therefore under no obligation to pay his check drawn against such account if it is exhausted before the check is presented by charging against it the amount of such note. *Bank* v. *Windisch-Muhlhauser Brewing Co.*, 660.

4. CHECKS—PRESENTMENT.—No custom among bankers as to the manner of presenting checks for payment will relieve them from the legal duty of presenting such checks within a reasonable time. *First Nat. Bank* v. *Miller*, 499.

5. POWER OF OFFICER.—The cashier of a bank has, by virtue of his office, no authority to accept the stock of an insurance or other corporation in payment of a debt due the bank. *Bank* v. *Hart*, 479.

6. MORTGAGES BY NATIONAL BANKS—FORECLOSURE—INJUNCTION.—Although national banks are prohibited by statute from loaning money on real estate and taking a mortgage as security, yet a mortgagee cannot

enjoin such bank from enforcing its loan by foreclosure of its mortgage. The penalty provided by the statute can be invoked by the United States alone. *State National Bank* v. *Flathers*, 216.

See CHECKS, 5–7; CORPORATIONS, 9, 11, 28.

BAWDY HOUSES.

See MUNICIPAL CORPORATIONS, 14.

BIGAMY.

1 DURESS AS DEFENSE.—A defendant on trial for bigamy cannot plead in defense that his second marriage was entered into under duress to avoid a prosecution for the seduction of the woman he then married. *Medrano* v. *State*, 775.

2. MISTAKE OF LAW AS DEFENSE.—A mistaken belief on the part of a defendant charged with bigamy that his first marriage was void at the time of his second marriage, because his first wife had deserted him for more than three years prior thereto, is a mistake of law, and constitutes no defense. *Medrano* v. *State*, 775.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCHANGE.

See CHECKS, 4.

BLASTING.

See NUISANCE.

BONA FIDE PURCHASERS.

See CORPORATIONS, 10; NEGOTIABLE INSTRUMENTS, 3–6, 9.

BONDS.

1. CORPORATE BONDS, SUIT WITHOUT TRUSTEE BEING PARTY.—The holder of a bond secured by a trust mortgage may maintain an action to foreclose such mortgage if the trustee has become incompetent to act. It is not necessary to first procure the appointment of a new trustee. *Ettlinger* v. *Persian Rug etc. Co.*, 587.

2. CORPORATE BONDS, SUITS UPON.—If the trustee of a trust mortgage to secure corporate bonds refuses to sue or is incompetent to do so by reason of his insanity, the holder of one of such bonds, in his own name, may sue to foreclose the mortgage. Any emergency which makes the demand upon a trustee futile or impossible, and leaves the bondholder without any reasonable means of redress, justifies his appearing as a plaintiff for the purpose of foreclosure. *Ettlinger* v. *Persian Rug etc. Co.*, 587.

See MECHANICS' LIENS; SURETYSHIP.

BONUS.

See CORPORATIONS, 32.

BOOKS.

See CORPORATIONS, 13–18.

BREACH OF PROMISE.

See MARRIAGE AND DIVORCE, 4, 5.

BURGLARY.

1. EVIDENCE OF SUCCESSIVE BURGLARIES.—On a trial for burglary evidence of prior and subsequent burglaries, and of the character and kind of articles taken and afterwards found concealed on the premises of the accused, is admissible as tending to show a regular system of crime organized and carried on by a band of criminals of which the accused was one. *Dawson* v. *State*, 791.
2. EVIDENCE—MISSING PROPERTY IN POSSESSION OF ACCUSED.—On a trial for burglary of freight-cars, proof that articles found to be missing from a certain car were afterwards found in the possession of the accused is admissible, and sufficient to show that the missing articles were in fact taken from that certain car. *Dawson* v. *State*, 791.
3. EVIDENCE—WAYBILLS.—On a trial of burglary from freight-cars waybills accompanying such cars, made out by clerks in the line of their duty, are admissible as original evidence to prove that the articles therein mentioned were shipped in such cars. It is not necessary to produce the clerks making them, nor the person who packed or loaded the packages in the cars to testify to these facts. If such waybills are beyond the jurisdiction of the court parol evidence of their contents is admissible. *Dawson* v. *State*, 791.
4. EVIDENCE—WAYBILLS—SECONDARY EVIDENCE OF CONTENTS.—On a trial for burglary of freight-cars, entries made by railway clerks in the line of their duty at the time of examining the contents of such cars to determine if any of the packages, as shown by the waybills accompanying the cars, are missing therefrom, are admissible as original evidence to show the original contents of such cars. *Dawson* v. *State*, 791.
5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—On a trial and conviction for burglary, when the only evidence directly connecting the accused with the crime is that of a state's witness whose connection with the stolen property tends to implicate him as an accomplice, which he denies being, a new trial should be granted to allow the introduction of newly discovered evidence to establish the complicity of such witness as an accomplice in fact to the burglary. *Dawson* v. *State*, 791.

BY-LAWS.

See CORPORATIONS, 9–11.

CARRIERS.

CARRIERS OF PASSENGERS ARE NOT REQUIRED TO USE ALL POSSIBLE CARE TO PROVIDE for the safe conveyance of passengers. Such carriers are not insurers of the safety of their passengers further than could be required by an exercise of such a high degree of forethought as to possible dangers, and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under similar circumstances. *International etc. Ry. Co.* v. *Welch*, 829.

See RAILROADS, 2–6; TELEGRAPH COMPANIES, 2.

CASHIER.

See BANKS, 5.

CERTIFICATE.

See ACKNOWLEDGMENTS; EVIDENCE, 3.

CERTIORARI.

1. CERTIORARI WILL ISSUE TO REVIEW A DETERMINATION though the time has passed when the decision can have any practical operation, if the questions involved are of public importance. *People* v. *Martin*, 592.
2. CERTIORARI DOES NOT LIE TO REVIEW THE ACTION OF AN INFERIOR BOARD OR TRIBUNAL in the exercise of purely legislative functions not judicial in character. *Wulzen* v. *Board of Supervisors*, 17.
3. CERTIORARI will lie to review and annul the proceedings of a board of supervisors in opening a street and designating lands to be taken therefor if the order of such board purports to condemn, appropriate, acquire, set apart, and take for public use the lands therein described, because such order goes beyond the legislative function of declaring the street an open and public one, and employs language appropriate to courts in proceeding to the final condemnation of land in the exercise of the power of eminent domain. *Wulzen* v. *Board of Supervisors*, 17.
4. JUDICIAL ACTS, WHAT ARE.—If the board of police commissioners are directed by law to publish the list of nominations in a newspaper having the largest circulation within the city and county, and which advocates the principles of the political party which at the last election cast the greatest number of votes in such city, the commissioners, in designating the newspaper, act judicially, and their determination may be reviewed on *certiorari* at the instance of a publisher of a newspaper claiming to have been entitled to be awarded the publication of such list. *People* v. *Martin*, 592.
5. JUDICIAL ACTION OF POLICE COMMISSIONERS.—If the board of police commissioners are required to publish certain lists of nominations, and to select certain newspapers which, according to the best information they can obtain, have the largest circulation within the city and county, they must act in good faith, and not proceed without making inquiry, but are not bound to resort to any particular evidence, nor to give the various newpaper representatives a formal hearing. If they allege in their return to the writ of *certiorari* that, in designating the newspaper, they selected that which, according to their best information, had the largest circulation in the city and county, such return must be received as true, unless some proceeding was taken to compel them to make a further return. *People* v. *Martin*, 592.

See CONTEMPT, 3.

CHARITIES.

1. A charity is a gift to promote the welfare of others. *Philadelphia* v. *Masonic Home*, 736.
2. WHEN PUBLIC.—A charity may restrict its admissions to a class of humanity and yet be public in its nature, and so long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may

be directly benefited, the charity is public. *Philadelphia* v. *Masonic Home*, 736.

3. WHEN NOT PUBLIC.—When the right to share in the benefits of a charity depends on the fact of voluntary association with some particular society, while all not members of such society are excluded, the charity is not purely public in its nature. *Philadelphia* v. *Masonic Home*, 736.

4. TAXATION OF.—A home for the relief of aged and indigent Masons only, though supported by voluntary contributions, without charge to the beneficiaries and without profit to the institution or its officers, is not a "purely public charity," and is not exempt from taxation under a constitutional provision exempting "institutions of purely public charity" from all taxation. *Philadelphia* v. *Masonic Home*, 736.

CHARTER.

See CORPORATIONS, 35, 36; MUNICIPAL CORPORATIONS, 8, 10, 27-29.

CHATTEL MORTGAGES.

1. A MORTGAGE UPON CHATTELS HAVING NO ACTUAL OR POTENTIAL EXISTENCE cannot operate to charge them with a lien when they come into existence as against an attaching or execution creditor. *Rochester Distilling Co.* v. *Rasey*, 635.

2. POTENTIAL EXISTENCE.—That which is an annual product of labor or of the cultivation of the earth cannot be said to have an actual or potential existence before it is planted so as to support a chattel mortgage thereof, though the mortgagor is in possession of the land upon which he then intends to plant the crops which he seeks to mortgage. *Rochester Distilling Co.* v. *Rasey*, 635.

CHECKS.

1. NEGOTIABLE INSTRUMENTS—PRESENTMENT.—Checks are not designed for circulation, but for immediate presentment for payment, and if not thus presented within a reasonable time according to the circumstances, the maker or indorser is released from liability. *Scroggin* v. *McClelland*, 520.

2. PRESENTMENT TO CHARGE INDORSER.—To charge an indorser of a check it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time depends upon the facts and circumstances of each particular case. *First Nat. Bank* v. *Miller*, 499.

3. PRESENTMENT TO CHARGE INDORSER—DAMAGES.—In an action to charge an indorser of a check, not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the laches in making presentment is immaterial. *First Nat. Bank* v. *Miller*, 499.

4. NEGOTIABLE INSTRUMENTS — PRESENTMENT — DILIGENCE REQUIRED.—Ordinary checks are not designed for circulation, but for immediate presentment for payment. To charge an indorser, a check must be presented with all dispatch and diligence consistent with the transaction of commercial concerns, although such checks are like inland bills of exchange, and governed by like principles, greater diligence is required in presenting checks than in presenting such bills. *First Nat. Bank* v. *Miller*, 499.

5. BANKS AND BANKING — PRESENTMENT TO CHARGE INDORSER — WANT OF DILIGENCE.—When a check indorsed in blank is received by a

bank in one town, drawn on a bank in another town, a short distance away, the two being connected by telegraph, telephone, and railroad lines, and two daily mails, the failure of the receiving bank or its agent in another city, to whom the check is sent, to present it for payment until five days after it is received, discharges the indorser. *First Nat. Bank* v. *Miller*, 499.

6. BANKING.—A CHECK DRAWN BY A DEPOSITOR ON THE BANK, unless it has been accepted, does not constitute an assignment so as to vest the fund or credit against which it is drawn, nor any part thereof, in the payee or holder. *Bank* v. *Windisch-Muhlhauser Brewing Co.*, 660.

7. BANKING.—A CHECK DRAWN UPON A BANK BY A GENERAL DEPOSITOR is not an order upon a specific fund, but merely a request that its amount be paid out of what is due the drawer, and therefore the holder is not entitled to its payment if the bank is not indebted to the drawer when it is presented. *Bank* v. *Windisch-Muhlhauser Brewing Co.*, 660.

8. STATUTE OF LIMITATIONS BEGINS TO RUN in favor of the drawer of an ordinary bank check, at the latest upon the expiration of a reasonable time for presenting the check for payment, whether the drawer is injured by the delay in presentment or not. *Scroggin* v. *McClelland*, 520.

See APPEAL 2; BANKS, 3, 4.

CLAIMS.

See MUNICIPAL CORPORATIONS, 25, 26.

CLOUD ON TITLE.

See JUDGMENTS, 2.

COLLATERAL SECURITY.

See CORPORATIONS, 6; NEGOTIABLE INSTRUMENTS, 3, 4.

COMBINATIONS.

See CONTRACTS, 9–12.

COMMISSIONERS.

See CERTIORARI, 4, 5; CONSTITUTIONS, 3.

COMMON LAW.

See CONSTITUTIONS, 2.

COMPOSITION.

See DEBTOR AND CREDITOR.

CONFESSIONS.

See CONSPIRACY, 2; EVIDENCE, 13, 15, 16.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS.—A MORTGAGE MADE IN INDIANA BY AND BETWEEN RESIDENTS THEREOF UPON PROPERTY SITUATE IN OHIO is an Indiana contract, and if invalid by the laws of that state, because one of the parties was without capacity to make it, cannot be enforced in Ohio. *Evans* v. *Beaver*, 666.

2. THE OBLIGATION OF THE SHIPPERS OF A CARGO to pay freight must be determined by the law of the place where the contract of affreightment was made, and the fact that the vessel was Italian cannot, where the contract was made in the United States, subject the contract of shipment to the operation of the Italian Commercial Code. *China etc. Ins. Co.* v. *Force*, 576.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; ATTACHMENT, 2-6.

CONSIDERATION.

See ADVANCEMENT, 2, 3.

CONSPIRACY.

1. EVIDENCE—FLIGHT OF ONE CONSPIRATOR is not evidence of the guilt of another conspirator. *McKenzie* v. *State*, 795.
2. EVIDENCE—CONFESSION OF GUILT MADE BY ONE CONSPIRATOR after a conspiracy to commit a crime is ended is not admissible in evidence against his co-conspirators, nor against any one but himself. *McKenzie* v. *State*, 795.
3. EVIDENCE.—DECLARATIONS OF A CONSPIRATOR or accomplice are receivable in evidence against his co-conspirators only when they are either in themselves acts, or accompany and explain acts, for which the latter are responsible, and not when they are in the nature of narratives, descriptions, or subsequent confessions. *McKenzie* v. *State*, 795.
4. EVIDENCE.—Acts and declarations of a conspirator to commit crime made after the conspiracy is ended by accomplishment or abandonment, voluntary or compelled, are not evidence against his co-conspirators nor any one but himself, and though the object of the conspiracy is not ended, such acts and declarations are not evidence against a co-conspirator, unless they are in furtherance of the common design. *McKenzie* v. *State*, 795.
5. EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.—When a conspiracy to commit crime is established, the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act of all, and is evidence against all. Each is deemed to assent to or to commend what is done by any other in furtherance of the common object. But after the common enterprise is ended, whether by accomplishment or abandonment, one conspirator is not permitted, by any subsequent act or declaration of his own, to affect the others. *McKenzie* v. *State*, 795.

CONSTITUTIONAL LAW.

See CONSTITUTIONS; COURTS; INSANE PERSONS, 1; LEGISLATURE; MUNICIPAL CORPORATIONS, 12, 18; STATUTES; TAXES, 2, 3.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW—RULES OF INTERPRETATION.—Words used in a constitution are to be interpreted with reference to the usage or custom of the country at the time of its adoption. *De Camp* v. *Archibald*, 692.
2. CONSTITUTIONAL LAW.—WHAT CONSTITUTES JUDICIAL POWER within the meaning of the constitution is to be determined in the light of the common law and the history of our institutions as they existed anterior to, and at the adoption of, the constitution. *De Camp* v. *Archibald*, 692.

3. CONSTITUTIONAL LAW.—BOARDS OF SUPERVISORS, CITY COUNCILS, AND THE LIKE BOARDS AND COMMISSIONS may, under the constitution of California, be invested with powers belonging to either or all of the three departments of government. *Wulzen* v. *Board of Supervisors*, 17.

See CHARITIES, 4; COURTS; OFFICERS, 3; STATUTES, 2, 4, 5, 13.

CONTEMPT.

1. A WITNESS IS GUILTY OF CONTEMPT in refusing to answer a question, if it does not involve any question of privilege on his part, and the notary determines it to be competent. *De Camp* v. *Archibald*, 692.

2. NEWSPAPER PUBLICATIONS.—When a newspaper or other publication, being read by jurors and attendants on the courts, has a tendency to interfere with the proper and unbiased administration of the law in pending cases, the resulting liability or responsibility is not limited to a civil action for damages by the parties prejudiced thereby, but it may be adjudged a contempt of court, and accordingly punished. *State* v. *Judge etc.*, 282.

3. NEWSPAPER PUBLICATIONS—REVIEW OF JUDGMENT.—When it is charged that a newspaper or other publication concerning judicial proceedings is of such character as to render it a contempt of the court in which the case is pending, and the article is presented in evidence in support of the charge, it is within the power of the trial court to examine and determine the character of the publication from all the evidence, and the decision reached by such court cannot be reviewed by the supreme court under writs of prohibition or *certiorari*. *State* v. *Judge, etc.*, 282.

4. JURISDICTION.—The power to punish for contempts, actual or constructive, is inherent in all courts of record, and is essential to the preservation of order in all judicial proceedings. *State* v. *Judge etc.* 282.

See HABEAS CORPUS, 1; NOTARIES PUBLIC.

CONTRACTS.

See MASTER AND SERVANT, 1, 2.

CONTRACTS.

1. CONSTRUCTION.—Written instruments made at the same time and relating to the same transaction must be read and construed together. *Jennings* v. *Todd*, 373.

2. DELIVERY OF IN ESCROW TO AN OBLIGEE.—A written contract, whether under seal or not, may, by parol, be proved to have been delivered to the obligee upon a parol condition that it was not to become binding until the happening of a future event, and may be avoided upon the further proof that such event has not occurred, especially if the contract is one not required to be under seal. *Blewitt* v. *Boorum*, 600.

3. STATUTE OF FRAUDS.—A SALE OF GROWING TIMBER to be presently cut and removed from the land is a contract concerning the land, and is within the statute of frauds, and inoperative, unless evidenced by a writing. *Hirth* v. *Graham*, 641.

4. PROMISE FOR BENEFIT OF THIRD PERSON.—If one makes a promise to another for the benefit of and available to a third person, the latter

can maintain an action on the promise in his own name. *Maxcy* v. *New Hampshire etc. Ins. Co.*, 325.

5. A CONTRACT BY WHICH A PURCHASER AGREES TO PAY FOR MATERIALS AND LABOR FURNISHED thereunder, when the work has been completed and found to be in good working order, is not satisfied by the existence of good working order at the moment of completion, if the events almost immediately succeeding such completion conclusively establish that the result accomplished was not that contemplated by the contract. *Edison etc. Electric Co.* v. *Canadian Pac. Nav. Co.*, 910.

6. CONTRACTS BETWEEN MUNICIPALITY AND WATER COMPANY—RIGHT OF PRIVATE OWNER TO RECOVER FOR BREACH OF.—A contract and franchise granted by a city to a water company requiring that the "grantee shall constantly, day and night, except in case of unavoidable accident, keep all fire-hydrants supplied with water for instant service, and shall keep them in good order and efficiency," does not give to a private owner within the city limits, whose property is destroyed by fire, any right of action against such water company on account of its breach of contract in failing to furnish water as agreed. In such case there is no privity of contract between the water company and the private owner. *Eaton* v. *Fairbury Water Works*, 510.

7. RETENTION OF BENEFITS OF.—An instruction to a jury that if plaintiff performed the work and furnished the materials specified in the contract, and substantially performed all its conditions, and the defendant retained the materials in his possession, and made use of them and of the fruits of the work performed by the plaintiff, and did not offer to return such materials, then the plaintiff is entitled to the contract price, is erroneous if, when considered in connection with another instruction, it may have led the jury to infer that there was some duty on the part of the defendant to return the materials for which he wished to avoid liability. *Edison etc. Electric Co.* v. *Canadian Pac. Nav. Co.*, 910.

8. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS.—A CONTRACT IN WHICH A CREDITOR STIPULATES FOR A SPECIFIC REMEDY, whereby he may enforce a pecuniary obligation without resort to the courts, cannot be modified by subsequent legislation requiring him to pursue a different remedy. Hence, if a trust deed declares that on default in the payment of the obligation or demand secured by it, the creditor may sell the property at a designated place, and after giving the notice described in the deed, a statute subsequently enacted prescribing the mode of sale under all trust deeds is inapplicable, and a sale may lawfully be made by complying with the directions of the deed, though the directions of the statute are thereby disregarded. *International Building etc. Assn.* v. *Hardy*, 870.

9. COMBINATIONS IN BUSINESS.—ASSOCIATIONS MAY LAWFULLY BE FORMED the object of which is to adopt measures that may tend to diminish the gains and profits of another. *Bohn Mfg. Co.* v. *Hollis*, 319.

10. COMBINATIONS IN TRADE—LEGALITY OF.—Any one man, unless under contract obligation, or unless his employment charges him with some public duty, may lawfully refuse to work for or to deal with any man or class of men. This right which one man may exercise singly, many may agree to exercise jointly and make simultaneous declaration of their choice by voluntary association. *Bohn Mfg. Co.* v. *Hollis*, 319.

11. AGREEMENTS IN GENERAL RESTRAINT OF TRADE are not actionable at the instance of third parties. *Bohn Mfg. Co.* v. *Hollis*, 319.

12. COMBINATION IN TRADE—INJUNCTION.—An agreement between the members of a retail lumber association that they will not deal with any wholesale dealer or manufacturer who sells to customers, nor dealers, at a point where a member of the association is doing business, and containing a provision for notice being given to all members whenever a wholesaler makes any such sale, is not void as stipulating for an unlawful combination in restraint of trade, nor is a wholesaler who makes a sale in violation of such agreement entitled to enjoin such association from giving notice to all its members of the fact. *Bohn Mfg. Co.* v. *Hollis*, 319.

See CONFLICT OF LAWS, 2; CORPORATIONS, 30–34; CUSTOM, 2, 3.

CONVERSION.

See CORPORATIONS, 4, 5; TROVER.

CONVEYANCES.

See COTENANCY; DEEDS; MORTGAGE.

CORPORATIONS.

1. A CORPORATION IS AN artificial being, invisible, intangible, and existing only in contemplation of law, and possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. *Higgins* v. *Downward*, 141.

2. A FRANCHISE IS a certain privilege conferred by grant from the government and vested in individuals. *Higgins* v. *Downward*, 141.

3. A FRANCHISE IS PROPERTY, and cannot, wantonly or of whim, be taken away by a legislative act and transferred to another. *Higgins* v. *Downward*, 141.

4. CONVERSION—WHEN IRREVOCABLE.—The wrongful and irregular sale of stock of a shareholder in a corporation for the nonpayment of dues is a conversion of the stock by the corporation, for which an action can be sustained against it by the owner or his assignee. The corporation cannot avoid liability, nor mitigate the damages which the shareholder is entitled to recover by an offer to reinstate such shareholder upon payment of the accrued delinquent dues, made after it has been judicially determined that such sale was unlawful. *Carpenter* v. *American Building etc. Assn.*, 345.

5. CONVERSION OF STOCK—SURRENDER OF STOCK CERTIFICATES.—The wrongful and irregular sale of corporate stock by the corporation issuing it is a conversion, for which an action can be maintained by the owner or his assignee without surrendering the certificates of stock. *Carpenter* v. *American Building Assn.*, 345.

6. ASSIGNMENT OF STOCK.—An agreement between the holder of bank stock and his sureties that the former is to leave his stock in the bank as collateral security, to indemnify them against the payment of notes signed by them as security for him to enable him to raise money with which to buy the stock pledged, is not an assignment of the stock, legal or equitable. *Bank* v. *Durfee*, 396.

7. RESTRICTIONS ON ALIENATION OF STOCK.—Alienation is an incident to corporation stock, and a by-law prohibiting this right or imposing

any restrictions on its exercise is in restraint of trade, against public policy, and void, in the absence of express statutory authority. *Bank* v. *Durfee*, 396.

8. RIGHT TO CHARGE STOCK WITH INDEBTEDNESS OF HOLDER.—A corporation a successor to a partnership whose book-keeper has converted part of its property to his own use may charge his stock with his shortage accruing before the incorporation. *Bank* v. *Durfee*, 396.

9. LIEN ON STOCK—INNOCENT PURCHASER.—A by-law of a banking corporation providing that no transfer of stock shall be allowed so long as the holder is indebted to the bank, and that the bank shall reserve a lien on all stock for such indebtedness, is void as against an innocent holder or purchaser for value unless expressly authorized by statute. *Bank* v. *Durfee*, 396.

10. POWER TO CREATE LIEN ON STOCK.—A corporation may make by-laws regulating the transfer of its stock, but it cannot thereby create a secret lien on the stock which would adhere to it in the hands of a *bona fide* purchaser without notice. *Bank* v. *Durfee*, 396.

11. LIEN ON STOCK WHEN VALID.—A by-law of a banking corporation providing for a lien in its favor on its stock for an unpaid indebtedness due from the holder, although passed without authority, is binding on him and purchasers from him with notice when at the time of the adoption of such by-law and the transfer of the stock such holder was an officer of the bank and a party to the passage of the by-law. *Bank* v. *Durfee*, 396.

12. A STOCKHOLDER'S RIGHT TO MAKE ABSTRACTS AND MEMORANDA OF DOCUMENTS, BOOKS, AND PAPERS is as full and complete as is his right to an inspection thereof. *Swift* v. *Richardson*, 127.

13. STOCKHOLDERS—RIGHT TO INSPECT BOOKS—REMEDY.—Stockholders in a corporation have a right to inspect and examine its books at any reasonable time, and a denial of this right by the corporation in a proper case exposes it to an action, either of *mandamus* or for damages. *Legendre* v. *New Orleans Brewing Assn.*, 243.

14. INSPECTION OF BOOKS—MANDAMUS.—The right of a stockholder in a corporation to inspect its books is not so absolute that *mandamus* issues to compel such inspection without regard to facts or circumstances. The reasonableness of the request for an inspection must be considered. *Legendre* v. *New Orleans Brewing Assn.*, 243.

15. MANDAMUS AGAINST.—A STOCKHOLDER in a corporation may have a writ of *mandamus* to compel the custodian of corporate documents to allow him an inspection and copies of them at proper times and on proper occasions. *Swift* v. *Richardson*, 127.

16. INSPECTION OF BOOKS—REFUSAL OF RIGHT WHEN JUSTIFIABLE.—The refusal of the right of a stockholder to inspect the books of a corporation of which he is a member is justifiable when curiosity is the motive, or when the object is manifestly in opposition to the interests of the corporation. *Legendre* v. *New Orleans Brewing Assn.*, 243.

17. RIGHT OF STOCKHOLDER TO INSPECT BOOKS—LIABILITY FOR REFUSAL.—A stockholder cannot hold his costockholders nor the corporation liable in damages on account of the refusal by an officer therein of an informal request made to allow certain corporation books to be inspected, although the stockholder would have ascertained from such inspection that the affairs of the corporation were not properly conducted by its directors. *Legendre* v. *New Orleans Brewing Assn.*, 243.

18. RIGHT OF STOCKHOLDER TO INSPECT BOOKS—DAMAGES FOR REFUSAL.—An error of an officer in a subordinate position in a corporation in refusing to permit its books to be inspected by a stockholder does not of itself expose the corporation to liability for damages. To fix its liability it must appear that the officer acted under authority, express or implied, or that his act was adopted or ratified by the corporation. *Legendre* v. *New Orleans Brewing Assn.*, 243.

19. KNOWLEDGE OF STOCKHOLDER AS NOTICE TO.—To render the knowledge of individual corporators the knowledge of the corporation, it must be the knowledge of all the corporators. *Mercantile Nat. Bank* v. *Parsons*, 299.

20. POWER TO PURCHASE STOCK IN ANOTHER CORPORATION.—A banking or other corporation has no power to purchase stock in an insurance or other corporation, unless expressly authorized by statute. *Bank* v. *Hart*, 479.

21. RAILWAY CORPORATIONS—JUDGMENT NOT INCLUDED IN A MORTGAGE.—Under a power to mortgage its estate, real and personal, a railway corporation cannot, by mortgaging the road with all rights, privileges, immunities, and franchises, mortgage a judgment in its favor, nor can a judicial sale under such mortgage transfer a judgment existing in favor of the corporation. *Higgins* v. *Downward*, 141.

22. A CORPORATION HAVING STOCK IN ANOTHER CORPORATION standing in its own name on the books of the latter is liable in an action for its proportion of a debt due from such corporation, where it is not absolutely prohibited from acquiring title to such stock, and cannot avoid such liability by alleging that its acquisition of such title was *ultra vires*, especially when it has received dividends on the stock, and to that extent diminished the corporate property which might otherwise have been applied to the satisfaction of the plaintiff's debt. *Kennedy* v. *California Sav. Bank*, 69.

23. NEGOTIABLE INSTRUMENTS OF CORPORATION—ISSUE OF BY AGENT—RIGHTS OF HOLDER.—Notes which show upon their face that they are issued in the name of a corporation by its agent for his own benefit are *prima facie* void at the instance of the corporation, and holders cannot recover on them unless they can show that they were issued by such agent under proper authority from the corporation. *Chemical Nat. Bank* v. *Wagner*, 206.

24. THE DEFENSE OF ULTRA VIRES is looked upon by the courts with disfavor whenever it is presented for the purpose of avoiding an obligation which the corporation has assumed merely in excess of powers conferred upon it, and not in violation of some express provision of the statute. *Kennedy* v. *California Sav. Bank*, 69.

25. POWER OF OFFICERS.—The president of a corporation has no power to authorize its treasurer to issue notes in its name for his personal benefit. *Chemical Nat. Bank* v. *Wagner*, 206.

26. LIABILITY FOR ACTS OF OFFICERS.—A corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. To fix the liability it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of general authority, in relation to the subject of it, or that the act was adopted or ratified by the corporation. *Legendre* v. *New Orleans Brewing Assn.*, 243.

27. NEGOTIABLE PAPER OF CORPORATION—AUTHORITY OF AGENT OR OFFICER TO ISSUE.—An officer in a corporation whose authority is confined to taking charge of the finances of the company, signing its checks, receiving and accounting for its money coming to his hands, and to acting as a business committee in the absence of the president and vice-president, has no authority to issue notes in the name of the corporation so as to bind it, in the absence of proof of the absence of such president and vice-president at the time of the issue of the notes or of special authority given by the corporation to such officer to issue them. *Chemical Nat. Bank* v. *Wagner*, 206.

28. INVESTMENT OF FUNDS OF.—The power of the officers of a banking or other corporation in dealing with, or investing the funds of its stockholders is limited to the purposes for which the incorporation is incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business. *Bank* v. *Hart*, 479.

29. LIABILITY FOR ACTS OF AGENT.—An agent of a corporation may bind it, if he acts under immediate instructions from some superior agent authorized to thus act, or from the board of directors. *Chemical Nat. Bank* v. *Wagner*, 206.

30. A PROMOTER, though he purported to act on behalf of the projected corporation, and not for himself, cannot be treated as its agent, because the nominal principal is not then in existence. Hence when there is nothing more than a contract by the promoter, in which he undertakes to bind the future corporation, such contract cannot be enforced. *Weatherford etc. Ry. Co.* v. *Granger*, 837.

31. CONTRACTS MADE BY PROMOTERS ON BEHALF OF A PROJECTED CORPORATION, within the scope of its general authority, may be adopted by it after its organization, and such adoption results from the corporation after its organization, with notice of the facts, accepting the benefits of the contract. *Weatherford etc. Ry. Co.* v. *Granger*, 837.

32. IF A PROMOTER OF A RAILWAY CORPORATION AGREES WITH A THIRD PERSON to aid in procuring a *bonus* for such corporation, and the *bonus* is procured through his aid, and the corporation afterwards organizes, it does not, by accepting the *bonus*, become liable on the contract thus made by the promoter. *Weatherford etc. Ry. Co.* v. *Granger*, 837.

33. THERE IS NO IMPLIED PROMISE IMPUTED TO A CORPORATION to pay for the services of a corporator or promoter before it comes into existence. *Weatherford etc. Ry. Co.* v. *Granger*, 837.

34. CORPORATIONS ARE NOT LIABLE UPON CONTRACTS MADE BEFORE THEY ARE IN EXISTENCE, and this rule is applicable under the statutes of Texas to contracts made with an attorney by a promoter for services in advising as to, and preparing, articles of incorporation. *Weatherford etc. Ry. Co.* v. *Granger*, 837.

35. THE CHARTER OF A RAILWAY CORPORATION IS NOT REPEALED OR DESTROYED, NOR ITS FRANCHISE DIVESTED by a statute purporting to incorporate the purchasers of its railroad at a judicial sale and vest them with all the right, title, interest, possession, claim, and demand at law or in equity of, in, or to such railroad or its appurtenances, and with all such rights, powers, immunities, privileges, franchises of the corporation as whose property the same was sold, if, in fact, such corporation possessed franchises which were not subject to such sale nor affected thereby. *Higgins* v. *Downward*, 141.

36. THE CHARTER OF A CORPORATION DOES NOT EXPIRE BY REASON OF AN OMISSION OR COMMISSION OF ACTS on the part of the company for declaring a forfeiture, but such franchises continue in full force until the penalty of forfeiture is claimed by the state, by and through legal proceedings by which the cause of forfeiture is legally declared. *Higgins* v. *Downward*, 141.

37. NONUSER.—The mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years, does not put an end to its franchises, though this may be a good ground for declaring them forfeited by judicial proceedings. *Higgins* v. *Downward*, 141.

38. UPON THE DISSOLUTION OF A CORPORATION by the expiration of its charter, the debts due to it are extinguished. *Higgins* v. *Downward*, 141.

39. ON THE DISSOLUTION OF A CORPORATION ITS PROPERTY BECOMES a fund to be administered in equity for the payment of its creditors, and afterwards for distribution among its stockholders. *Higgins* v. *Downward*, 141.

40. FOREIGN CORPORATIONS.—If the laws of a state or country provide that foreign corporations may register in the manner therein prescribed, and shall then be entitled to the privileges of domestic corporations, but if any of them shall do business without such registration, it shall incur a penalty, not exceeding five dollars per day, for every day during which it carries on business, this is not a prohibition against its doing business, and therefore a contract made by it, though it had not registered, is valid and enforceable. *Edison Electric Co.* v. *Canadian Pac. Nav. Co.*, 910.

See BONDS; MANDAMUS, 4, 5; NEGOTIABLE INSTRUMENTS, 6.

COTENANCY.

1. A CONVEYANCE OF A SPECIFIC PART of the common property by one of several cotenants may be ratified by the other cotenants, and thus made to operate as a partition or conveyance in severalty, but such ratification must be proved, and will not be presumed. *Gordon* v. *San Diego*, 73.

2. A CONVEYANCE BY A COTENANT, PURPORTING TO GRANT THE WEST HALF OF A LOT of which he owns but the undivided one-half, does not divest his interest in the whole lot, nor does such conveyance operate as a partition, in the absence of the ratification thereof by the other cotenants. *Gordon* v. *San Diego*, 73.

See AGENCY, 4.

COURTS.

CONSTITUTIONAL LAW—APPELLATE PRACTICE.—The questions of fact which the Louisiana supreme court is required by the state constitution to examine in respect to the legality or constitutionality of a fine, forfeiture, or penalty are those necessary to determine the questions arising as to such fine, forfeiture, or penalty imposed in a municipal ordinance, and not as to a fine imposed by a city recorder under an ordinance upon the facts of a special and particular case. *State* v. *Fourcade*, 249.

See ADMIRALTY; CONTEMPT, 3; JURISDICTION; MANDAMUS, 1; SEALS.

CREDITOR'S SUIT.

1. A CREDITOR'S BILL TO COMPEL HIS DEBTORS TO DISCLOSE PROPERTY which they seek to have subjected to execution cannot be sustained under the statutes of Texas. *Cargill* v. *Kountze*, 853.

2. JUDGMENT, CONCLUSIVENESS OF.—The defendant in a creditor's bill to set aside a transfer made to him for the purpose of defrauding the complainant cannot question the judgment recovered by the latter against the alleged fraudulent grantor in the absence of fraud or collusion. *Weaver* v. *Haviland*, 631.

CRIMINAL LAW.

SOLICITATION TO COMMIT ADULTERY is not of itself an attempt to commit adultery. *State* v. *Butler*, 900.

See ADULTERATION; BAIL; BIGAMY; BURGLARY; CONSPIRACY; EXTRADITION; FORGERY; JUDGMENTS, 10; LARCENY; OFFICERS, 7; RAPE; SEDUCTION.

CROPS.

See CHATTEL MORTGAGES, 2.

CROSS-EXAMINATION.

See WITNESSES.

CUSTOM.

1. EVIDENCE OF WHEN ADMISSIBLE.—Custom and usage may be proved to supply evidence of the intention of the parties to a contract as well as to explain and aid in the construction of phrases therein having a peculiar or technical meaning. *Destrehan* v. *Louisiana etc. Lumber Co.*, 265.

2. EVIDENCE OF WHEN ADMISSIBLE.—Under a contract for the sale of logs according to "board measure" proof of custom is admissible to show the amount to be deducted for hollow or peeky logs when the contract is silent on this subject. *Destrehan* v. *Louisiana etc. Lumber Co.*, 265.

3. EVIDENCE OF WHEN ADMISSIBLE.—When a written contract for the sale of logs fails to express or indicate the method of measurement to be followed, proof of custom or usage is admissible to show and explain the unexpressed intention of the parties as to the mode of measurement to be adopted. *Destrehan* v. *Louisiana etc. Lumber Co.*, 265.

See BANKS, 4; CONSTITUTIONS, 1.

DAMAGES.

1. DAMAGES FOR FRIGHT cannot be recovered where there is no injury to property and no physical injury, though such fright and mental suffering therefrom resulted from the negligence of the defendant. *Gulf etc. Ry. Co.* v. *Trott*, 866.

2. PLEADING—DAMAGES, GENERAL ALLEGATION OF.—A general allegation of damages lets in evidence of such damages only as naturally or necessarily resulted from the wrongs charged. Hence, where an injury is stated to consist of the breaking and crushing of the bones of the plaintiff's hip and thigh, bruising, wounding, and injuring his back, bowels, hips, legs, and other parts and members of his body, and that from such injuries plaintiff had suffered great pain, lost the use of his leg, and

been incapacitated from labor and earning money, he is not, though married, entitled to recover damages for the impairment of his capacity for sexual intercourse. *Campbell* v. *Cook*, 878.

See CONTEMPT, 2.

DEBTOR AND CREDITOR.

1. IF A COMPOSITION AGREEMENT is made between a debtor and his creditors, any agreement made or security taken for an amount beyond the composition, or even for that sum, better than that which is common to all, if unknown to the other creditors, is inoperative and void. The law will set aside and disregard all secret terms made by a creditor with the debtor more favorable to the former than is allowed the other creditors. *Hanover Nat. Bank* v. *Blake*, 607.

2. COMPOSITION AGREEMENT, FRAUD DOES NOT WHOLLY AVOID.—If a composition agreement is entered into between a debtor and his creditors, and one of them makes with him some extrinsic secret agreement to secure an advantage over the others, this latter agreement is void, and must be disregarded, but its existence does not avoid the composition agreement so as to disentitle such creditor to recover whatever is due to him thereunder. *Hanover Nat. Bank* v. *Blake*, 607.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; BANKS, 2; CREDITOR'S SUIT; INSOLVENCY.

DECEDENT ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DECLARATIONS.

See APPEAL, 4, 5; CONSPIRACY, 3–5; EVIDENCE, 8–12, 14.

DEEDS.

1. DELIVERY OF, WHEN SUFFICIENT.—If a person named as grantor in a conveyance receives of the grantee a lease of the same premises for the term of the grantor's life, and the grantor in company with the grantee takes both instruments to a bank and delivers them to the cashier, with an indorsement to deliver them to the grantor, and in the event of her death, to the grantee, and subsequently speaks of the conveyance as the grantee's deed, these facts justify a finding that such conveyance had been delivered, and had become operative in the lifetime of the grantor, if she died without ever having called for the deed. *Martin* v. *Flaharty*, 415.

2. THE QUESTION OF DELIVERY IS ONE OF INTENTION, and the delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. *Martin* v. *Flaharty*, 415.

3. A CONVEYANCE TO WHICH THE SIGNATURE OF THE GRANTOR IS AFFIXED BY ANOTHER at the grantor's direction, in his presence, or which, though not so affixed, is subsequently adopted and ratified by the grantor, is valid. *Blaisdell* v. *Leach*, 65.

4. CONVEYANCE—ESTOPPEL FROM ACKNOWLEDGMENT OF.—If one named as a grantor in a deed acknowledges that the signature thereto is his before a notary public, who thereupon affixes his certificate of such acknowledgment, this is a public declaration of such grantor which he is estopped

from controverting as against one who, in reliance thereon and without notice, has parted with property. *Blaisdell* v. *Leach*, 65.

5. ACKNOWLEDGMENT OF DEED, IMPEACHING.—Fraud or bad faith on the part of a person named as a grantee in a deed need not be established before its effect may be destroyed by proof that it was never in fact acknowledged by a married woman named as a grantor therein. Without such acknowledgment it has no greater effect than if it had been forged, and it was the duty of the person claiming an interest thereunder to ascertain whether or not it had been executed as required by law. *Le Mesnager* v. *Hamilton*, 81.

6. MUNICIPAL CORPORATIONS—DEED OF IS EVIDENCE OF THE TRUTH OF THE RECITALS THEREIN.—If a conveyance executed by the authorities of a municipal corporation recites the existence of facts without which its execution would be unauthorized and void, such recitals are evidence of the facts recited, and no other or further evidence is required in support of such deed. *Gordon* v. *San Diego*, 73.

See ACKNOWLEDGMENTS, 2; ESTOPPEL, 2; INSANE PERSONS, 4–6; PLEADING, 4; STATUTES, 15; TRUSTS.

DEFAULTS.

See JUDGMENTS, 6–8.

DEFINITIONS.

Advancement. *Hattersley* v. *Bissett*, 532.

Board measure is the number of feet of board produced by a log when sawed. *Destrehan* v. *Louisana etc. Lumber Co.*, 265.

Charity. *Philadelphia* v. *Masonic Home*, 736.

Corporation. *Higgins* v. *Downward*, 141.

Election is an obligation imposed upon a party to choose between two inconsistent rights or claims in cases where there is a clear intention of the person from whom he derives one that he shall not enjoy both. *Hattersley* v. *Bissett*, 532.

Franchise. *Higgins* v. *Downward*, 141.

Garnishment. *American etc. Ins. Co.* v. *Hettler*, 522.

Legislative Act. *Wulzen* v. *Board of Supervisors*, 17.

Mandamus. *Swift* v. *Richardson*, 127.

"More or Less." *Frenche* v. *Chancellor*, 548.

Municipal Corporation. *Coyle* v. *McIntire*, 109.

Negligence. *McDonald* v. *International etc. Ry. Co.*, 803

"Purely Public Charity." *Philadelphia* v. *Masonic Home*, 736.

"Trustee." *Mercantile Nat. Bank* v. *Parsons*, 299.

DELIVERY.

See CONTRACTS, 2; DEEDS, 1, 2; PLEADING, 4.

DENIAL.

See PLEADING, 2–4.

DEPOSITIONS.

DEPOSITIONS, CONTINUED ABSENCE OF WITNESS, WHETHER MUST BE SHOWN. If depositions are properly taken a short time before a trial on the ground that the witness is about to depart from the jurisdiction of the

court, they may be admitted in evidence without proof that he cannot be brought to testify in person. The party objecting to the use of the depositions must show that the presence of the witness could have been procured at the trial. *Hennessy* v. *Niagara etc. Ins. Co.* 892.

DEVISE.

WILLS—RIGHTS OF DEVISEES UNDER OIL AND GAS LEASE—ROYALTIES. When three contiguous tracts of land, subject to one oil and gas lease made by the owner in his lifetime, are devised by him respectively to his three children in equal parts, without mention of the lease, royalties accruing thereunder after his death should be divided among the three devisees in proportion to the acreage held by each, although the oil is produced from wells sunk on one of the tracts only. *Wettengel* v. *Gormley*, 733.

See ESTATES; WILLS.

DISCRIMINATION.

See INSURANCE, 19.

DISORDERLY HOUSES.

See MUNICIPAL CORPORATIONS, 15–17.

DISSOLUTION.

See CORPORATIONS, 38, 39; LIMITATIONS OF ACTIONS, 4; PARTNERSHIP, 3, 10.

DIVIDENDS.

See CORPORATIONS, 22; ESTATES, 6.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

See MORTGAGES, 2; POWERS, 2.

DUE PROCESS OF LAW.

See MUNICIPAL CORPORATIONS, 28; STATUTES, 16–18; TAXES, 2, 3.

DURESS.

1. ASSIGNMENT OF PERSONAL PROPERTY by a debtor to a creditor cannot be set aside on the ground of duress because the assignment is the result of a threat by the creditor to a third person to arrest the debtor, when he is neither arrested, nor is any criminal prosecution instituted against him. *Phillips* v. *Henry*, 706.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignee for the benefit of creditors cannot plead that the assignment was made under duress by his assignor for the purpose of setting aside an otherwise legitimate transfer of property by the assignor to pay an honest debt. *Phillips* v. *Henry*, 706.

See BIGAMY, 1.

DYING DECLARATION.

See EVIDENCE, 11, 12.

EASEMENTS.
See MUNICIPAL CORPORATIONS, 20, 21.

ELECTION.
See DEFINITIONS; INDICTMENT; WILLS, 2.

EMBEZZLEMENT.
See OFFICERS, 2.

EMINENT DOMAIN.
CONSTITUTIONAL LAW—LEGISLATIVE QUESTIONS, WHAT ARE.—The determination as to whether or not the right of eminent domain should be exercised and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question and not a judicial one, where it is conceded that the use for which the right is sought to be exercised is a public use. *Wulzen* v. *Board of Supervisors*, 17.
See CERTIORARI, 3.

ENACTMENT.
See STATUTES, 1–5.

EQUITABLE CONVERSION.
See WILLS, 3.

EQUITY.
1. JURISDICTION.—When a court of equity has once assumed jurisdiction over a particular case it cannot be ousted therefrom, simply because, in the development of legal means, redress becomes attainable at law. *Smithson* v. *Smithson*, 504.
2. JURISDICTION OVER PERSON IN RELATION TO PROPERTY IN ANOTHER JURISDICTION.—Equity acts *in personam* primarily, and when a person against whom relief is sought is within the jurisdiction, the court may make a decree as to any act, contract, or equity subsisting between the parties respecting property situated beyond its jurisdiction to prevent any inequitable act or transaction from being done in such foreign jurisdiction in relation to such property, or if such inequitable act has been done the court may order a restoration of the proceeds of the reprobated transaction as justice may require. *Hayden* v. *Yale*, 232.
3. DECREE OF DIVORCE OBTAINED BY FRAUD—REMEDY IN EQUITY TO VACATE. A person against whom a decree of divorce has been obtained by fraud may maintain a suit in equity to have it annulled when the proceedings provided by statute are inadequate to afford relief. *Smithson* v. *Smithson*, 504.
4. A PLAINTIFF IS NOT AN INNOCENT PURCHASER at a foreclosure sale, when he knows he has not served defendant with process and that the appearance of the defendant has been entered by an attorney. The judgment and sale will therefore be vacated in equity if such appearance is proved to have been unauthorized. *McEachern* v. *Brackett*, 922.
5. A JUDGMENT PROCURED BY THE UNAUTHORIZED APPEARANCE OF AN ATTORNEY, and a foreclosure sale based thereon, will be vacated in equity though the defendant had no defense to the action, if he offers to pay the amount of the mortgage debt and interest. He is not confined to his

remedy against the attorney though the latter is solvent. *McEachern* v. *Brackett*, 922.

6. SURETYSHIP, REFORMATION OF CONTRACT OF.—A written instrument which by mistake fails to express the agreement of the parties may be reformed, and then enforced against a surety. Hence, if in a prosecution by Margie C., sureties are offered that the accused will appear and answer such accusation, but the undertaking which they execute is by mistake so drawn that it declares that they will appear and answer the accusation of Margie K., such undertaking may be reformed and enforced in an action against the sureties. *Neininger* v. *State*, 674.

7. LACHES.—A SUIT IN EQUITY TO SET ASIDE A DECREE FORECLOSING A MORTGAGE for want of jurisdiction and to be permitted to pay the mortgage debt, though brought five years after such foreclosure, is not abated by the laches of the complainant, though he paid no taxes on the property in the mean time and took no proceedings to ascertain whether the mortgage had been foreclosed, or to pay the indebtedness or the interest accruing thereon, if, as a matter of fact, he had no notice of the suit to foreclose, and the mortgage provided that the taxes might be paid by the mortgagee and then recovered as part of the mortgage debt. *McEachern* v. *Brackett*, 922.

See JUDGMENTS, 2, 4–6; LIMITATIONS OF ACTIONS, 1, 6; LIS PENDENS, 2, 3.

ERROR.

See APPEAL.

ESCROW.

See CONTRACTS, 2.

ESTATES.

1. REMAINDERS, LIFE TENANT AND REMAINDERMAN—WHO ENTITLED TO POSSESSION.—When a general devise of money, stocks, or bonds is made to one for life with remainder over, the life tenant is not entitled to possession; but the executor retains it, paying to the life tenant the income, unless from the whole will it appears that it was the intention of the testator that the life tenant should have possession of the thing devised, and in the latter event the intention of the testator must control. *Watkins* v. *Snadon*, 203.

2. WILLS — CONSTRUCTION — LIFE TENANTS—INCOME.—Trustees under a will authorizing the sale of any of the estate, and directing them to invest the proceeds "so as to be safe and produce income," and to pay the income to the testator's wife and children for their lives, with remainder over, are not to treat the unproductive real estate as converted as of the time of the testator's death so as to allow the life tenants income from that time, but are to allow them the income actually realized only. *Hite* v. *Hite*, 189.

3. LIFE TENANTS AND REMAINDERMEN—APPORTIONMENT OF EXPENSES OF ESTATE.—Under a will giving the income from the estate to life tenants with remainder over, the income should bear the annual expense of its collection and disbursement, but the expense of conversion and reinvestment of the principal being for the benefit of both remainderman and life tenant should be apportioned between them. *Hite* v. *Hite*, 189.

4. LIFE TENANTS AND REMAINDERMEN—STOCKS—INVESTMENT BY TRUSTEES When trustees, under a will giving to life tenants the income of an

estate with remainder over, invest the principal in stocks at above par, the cost of the stocks is to be charged to such principal without deduction from the income of the life tenant on account of the excess above the par value. *Hite* v. *Hite*, 189.

5. LIFE TENANTS AND REMAINDERMEN—STOCKS, TO WHOM BELONG.—A privilege given by a corporation to its stockholder to take additional stock at par when stock is worth more, is a right appurtenant to the stock, and, as such, is part of the capital of an estate, and therefore belongs to the remainderman and not to the life tenant, under a will which gives the life tenant the income from an estate of which such stock forms a part. *Hite* v. *Hite*, 189.

6. LIFE TENANTS AND REMAINDERMEN—INCOME FROM STOCKS—WHO ENTITLED TO.—Corporate dividends, whether of stock or payable in money, are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared, and as between a life tenant entitled to the income from an estate out of which such dividends are declared and the remainderman, they belong to the life tenant if a profit and declared after his tenancy has commenced, although they may result in part from profits previously earned, but if declared out of profits resulting from the sale of real estate owned by the corporation at the time of the testator's death they belong to the remainderman and not to the life tenant. *Hite* v. *Hite*, 189.

ESTOPPEL.

1. RECEIPT OF PAYMENT of toll on logs towed through a canal without stipulation that toll shall be paid upon the boat by which they are towed precludes the right of collecting toll upon such boat. *Destrehan* v. *Louisiana etc. Lumber Co.*, 265.

2. ESTOPPEL TO DENY THE EXECUTION OF A CONVEYANCE ON THE GROUND THAT IT WAS FORGED arises when, being produced to the grantor by a notary public, such grantor acknowledges the execution thereof and attaches his certificate of such acknowledgment in due form, though the grantor made such acknowledgment in the mistaken belief that the conveyance was an entirely different instrument which he had executed on the same day, if such belief would not have existed had he examined the instrument at the time the acknowledgment was made before the notary public, and the property has been subsequently sold to a purchaser in good faith in reliance upon the record title including such deed and certificate of acknowledgment. *Blaisdell* v. *Leach*, 65.

See ATTACHMENT, 3; DEEDS, 4; MUNICIPAL CORPORATIONS, 30; NEGOTIABLE INSTRUMENTS, 8.

EVIDENCE.

1. EVIDENCE MUST BE CONFINED TO THE ISSUES, but this rule does not exclude testimony capable of affording a reasonable presumption or inference as to the principal fact or matter in dispute. *Brewing Co.* v. *Bauer*, 686.

2. EVIDENCE OF OTHER ACCIDENTS.—In an action to recover for injuries sustained by an employee, and which he claims resulted from the unsafe and dangerous character of an appliance with which it was his duty to work, evidence tending to show that on a prior occasion the same appliance behaved in the same manner as when he was injured is com-

petent as tending to prove some vice in its construction rendering its operation dangerous, and that the employer knew, or should have known, of such vice. *Brewing Co.* v. *Bauer*, 686.

3. A CERTIFICATE OF THE ACKNOWLEDGMENT OF A DEED IS NOT CONCLUSIVE evidence of the fact of such acknowledgment, but may be impeached by parol evidence that the person therein named never appeared before the officer certifying the acknowledgment. *Le Mesnager* v. *Hamilton*, 81.

4. JUDICIAL NOTICE—LAWS OF ANOTHER STATE.—The courts of one state do not take judicial notice of the laws of another. In the absence of proof the laws of both states are presumed to be the same. *Scroggin* v. *McClelland*, 520.

5. JUDICIAL NOTICE will be taken, when necessary for the administration of justice, of all previous and undisputed proceedings in the case appearing therein of record, certified and authenticated as required by law. *Hollenbach* v. *Schnabel*, 57.

6. JUDICIAL NOTICE may be taken by a court of the previous proceedings had in the cause, and therefore where, in an action for the possession of personal property, there is an affidavit and undertaking on behalf of the plaintiff for the return of the property describing it, and the return of the sheriff duly certified showing the taking of such property from the defendant and the delivery of it to the plaintiff, the court may take judicial notice of these papers, though not formally offered in evidence at the trial, and make findings against the plaintiff in accordance with the facts disclosed thereby. *Hollenbach* v. *Schnabel*, 57.

7. JUDICIAL NOTICE.—Courts take judicial notice that tobacco when taken into the stomach may produce nauseating effects. *State* v. *Johnson*, 405.

8. DECLARATIONS AS RES GESTÆ.—When it is necessary to inquire into the general nature of the act committed, or the intention of the party committing it, what such party said at the time is admissible in evidence as part of the *res gestæ*, for the purpose of showing its true character. Generally the declaration sought to be proved must be contemporaneous with the principal act; but when there are connecting circumstances they may, even when made some time afterwards, form a part of the *res gestæ*. *State* v. *Harris*, 259.

9. DECLARATIONS AS RES GESTÆ.—An act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narration of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period. *State* v. *Harris*, 259.

10. RES GESTÆ.—When in a conflict resulting in a homicide an ear of deceased is bitten or torn off by the accused, the fact of the finding of the ear, some fifteen minutes after the fight, on the ground where the difficulty occurred, together with the acts and declarations of the accused made at that time, and in relation thereto, are admissible in evidence as part of the *res gestæ*. *State* v. *Harris*, 259.

11. DYING DECLARATIONS WHEN INADMISSIBLE.—Dying declarations are inadmissible in evidence when fragmentary or incomplete, or when the declarant did not state who committed the crime concerning which such declarations are sought to be introduced. *State* v. *Johnson*, 405.

12. DYING DECLARATIONS WHEN ADMISSIBLE.—To make dying declarations admissible in evidence there must not only be an actual nearness of death, but an absolute conviction of it in the mind of the declarant. It is not enough that he should have thought that he

should ultimately never recover; the declaration must have been made under an impression of almost immediate dissolution. *State* v. *Johnson*, 405.

13. CONFESSIONS—ADMISSIBILITY.—A confession made by a person not under arrest nor in confinement, to be admissible, must be voluntary, not obtained by improper influences, nor by threats or promises of such character as may have influenced the person making the confession. *Cook* v. *State*, 758.

14. DECLARATIONS OF ACCUSED BEFORE ARREST.—Statements made to arresting officers before an arrest by a person accused of crime are admissible in evidence against him. *Brewer* v. *State*, 760.

15. A CONFESSION MADE BY AN ACCUSED WHO IS MISLED by an untrue statement that he had been seen to take goods, and would be prosecuted if he did not settle at once, and who settles at a price below a felony theft to stop prosecution, is not voluntary, and is not admissible in evidence on a subsequent prosecution against him for felony in taking such goods. *Cook* v. *State*, 758.

16. CONFESSIONS OBTAINED BY FALSE STATEMENTS of the prosecutor or by fraud are not voluntary, and are not admissible in evidence. *Cook* v. *State*, 758.

See ACCESSARIES; APPEAL, 1; BURGLARY; CONSPIRACY; CUSTOM; DAMAGES, 2; DEEDS, 6; DEPOSITIONS; EXECUTION, 5; HOMICIDE, 3–5; INSURANCE, 3; LARCENY, 3; RAILROADS, 1–3; TELEGRAPH COMPANIES, 5; WITNESSES.

EXECUTION.

1. LAWS EXEMPTING PROPERTY FROM SALE UNDER EXECUTION should be liberally construed. *Ferguson* v. *Speith*, 459.

2. EXECUTION SALES.—IT WILL BE PRESUMED IN SUPPORT OF A SHERIFF'S DEED that he took the necessary steps required by law to make a valid sale, and sold all that he was authorized by his levy to sell. *Smith* v. *Crosby*, 818.

3. JUDICIAL AND EXECUTION SALES ARE NOT SCRUTINIZED by the courts with a view to defeat them; on the contrary, every reasonable intendment will be made in their favor so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish. *Smith* v. *Crosby*, 818.

4. EXECUTION SALES—INTEREST LEVIED UPON.—A levy, sale, and conveyance by a sheriff under execution of the interest of the debtor in a league of land will pass title to so much thereof as he owns. *Smith* v. *Crosby*, 818.

5. EXECUTION SALES.—EXTRINSIC EVIDENCE may be received to clearly locate and identify land passing by a sheriff's deed containing an accurate but general description. *Smith* v. *Crosby*, 818.

6. A LEVY ON ALL THE DEFENDANT'S RIGHT, TITLE, AND INTEREST IN A TRACT of land is valid though his interest does not extend over the entire tract, and is an undivided interest in a separate parcel thereof. *Smith* v. *Crosby*, 818.

7. A CONVEYANCE OF ALL A PERSON'S RIGHT, TITLE, AND INTEREST IN A TRACT OF LAND necessarily transfers such tract so far as owned by him. Hence, though he owns an interest less than the whole tract, whether it be an undivided part of the whole or a tract in severalty, his interest, whatever it may be, is transferred. *Smith* v. *Crosby*, 818.

See CHATTEL MORTGAGES, 1; CREDITOR'S SUIT, 1; JUDICIAL SALES.

EXECUTORS AND ADMINISTRATORS.

1. WILLS, APPOINTMENT THEREIN OF ATTORNEYS FOR EXECUTORS.—A provision in a will selecting an attorney and directing the executor to consult and employ such attorney on all matters pertaining to the estate and the requirements of the will, is not binding upon the executor, and may be disregarded by him, nor does such provision show an intent to commit the execution of the will to such attorney and entitle him to be selected as one of the executors of the decedent, though the statute of the state declares that where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, though not named executor, is entitled to letters testamentary in like manner as if he had been so named. *In re Ogier*, 61.

2. ESTATES OF DECEDENTS.—IF A COURT ACQUIRES JURISDICTION of an estate by a petition for letters of administration thereon, and the petitioner is found not to be entitled to such letters, the court will proceed to grant letters to some competent person, and to settle the estate, though the heirs of the decedent protest against such grant and object to any administration at all. *In re Wilbur's Estate*, 886.

See SURETYSHIP, 1.

EXEMPTIONS.

See ATTACHMENT, 2, 7; CHARITIES, 4; EXECUTION, 1.

EXPULSION.

See RAILROADS, 16, 17.

EXTRADITION.

1. LIABILITY TO CIVIL PROSECUTION.—A party brought into one state from another by interstate rendition proceedings is not, while held in custody in the former state for the alleged crime, exempt from prosecution in a civil action in that state. *Reid* v. *Ham*, 333.

2. RETURN OF FUGITIVE—SECOND ARREST WITHOUT NEW REQUISITION.—When a legally extradited fugitive from justice is delivered to the agent of the demanding state, and is carried by him out of the limits of the asylum state, when he escapes and returns thereto he may be rearrested upon an *alias* warrant issued by the governor thereof upon credible notification of the escape, without a new requisition from the governor of the demanding state. *Ex parte Hobbs*, 782.

3. RETURN OF FUGITIVE—SECOND ARREST WITHOUT NEW REQUISITION—HABEAS CORPUS.—After an extradited fugitive has escaped and returned to the asylum state, the extradition agent cannot gather an armed force and rearrest by violence in that state, but he may report the escape to its governor and ask his assistance, and the latter may then issue an *alias* warrant for the rearrest of the escaped fugitive without a new requisition from the government of the demanding state. In such case the fugitive has a right to show by *habeas corpus* that his second detention is illegal. *Ex parte Hobbs*, 782.

4. RIGHT TO HOLD ESCAPED FUGITIVE FOR CRIME COMMITTED IN ASYLUM STATE AFTER HIS RETURN.—When an extradited fugitive escapes and returns to the asylum state, and is there under arrest and examination for a felony committed there subsequently to his return

and before his rearrest on the extradition charge, he may be held until the final disposition of such felony charge, before he is delivered to the extradition agent of the demanding state under a second warrant for his arrest and delivery for the extradition crime issued by the governor of the asylum state. *Ex parte Hobbs*, 782.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 9; RAILROADS, 9–11.

FINDINGS.

See TRIAL, 8.

FINES.

See COURTS.

FORECLOSURE.

See EQUITY, 4, 5, 7; LIS PENDENS, 4; MORTGAGES, 3, 4.

FORFEITURE.

See CORPORATIONS, 37; COURTS; INSURANCE, 5, 11, 12.

FORGERY.

1. FORGERY OF NAME OF DEAD PERSON.—The signing of the name of a dead person to an instrument with intent to defraud is forgery. *Brewer* v. *State*, 760.
2. FORGERY OF NAME OF UNAUTHORIZED OR FICTITIOUS PERSON.—One who, with intent to defraud, makes a false instrument, and signs the name of a fictitious person thereto, or of one having no legal capacity to make the paper, is guilty of forgery. *Brewer* v. *State*, 760.

See APPEAL, 2.

FRANCHISE.

See CORPORATIONS, 2, 35, 37.

FRAUD.

See ACKNOWLEDGMENTS, 1; CREDITORS' SUIT, 2; DEEDS, 5; EVIDENCE, 16; INSANE PERSONS, 6; JUDGMENTS, 3, 5, 7; SUBROGATION, 3; VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCES.

See CREDITORS' SUIT, 2.

FREIGHT.

See CONFLICT OF LAWS, 2; SHIPPING, 2.

FRIGHT.

See DAMAGES, 1.

FUGITIVES.

See EXTRADITION, 4.

FUTURE ADVANCES.

See MORTGAGES, 1.

GARNISHMENT.

See ATTACHMENT, 1, 6.

GENERAL AVERAGE.

See SHIPPING, 1.

GIFTS.

See CHARITIES, 1.

HABEAS CORPUS.

1. HABEAS CORPUS CANNOT BE USED AS A WRIT OF ERROR to review proceedings under which a party is imprisoned for contempt of court. *In re Copenhaver*, 382.
2. WHAT MAY BE INQUIRED INTO BY.—The writ of *habeas corpus* cannot have the force and operation of a writ of error or *certiorari* or appeal, nor is it designed as a substitute for either. It does not deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void. *State* v. *Kinmore*, 305.
3. JURISDICTION.—To bar an application by *habeas corpus* for discharge from arrest, by virtue of a judgment or decree or execution thereon, the court in which the judgment or decree was given must have had jurisdiction to render such judgment. *State* v. *Kinmore*, 305.
4. ATTACK ON JURISDICTION BY.—The jurisdiction of the tribunal whose judgment is involved over the person detained and the subject matter may be inquired into at all times on *habeas corpus*, though mere irregularity, informality, or error cannot be. *State* v. *Kinmore*, 305.

See EXTRADITION, 3; JURISDICTION, 2.

HIGHWAYS.

1. THE ESTABLISHMENT OF A GRADE does not necessarily require the enactment of an ordinance or other legislative action, but may be shown by the nature of the improvement on the surface of the highway under the direct sanction of the proper authorities, whether in accordance with an ordained grade line or not. *Smith* v. *Commissioners*, 699.
2. CHANGE IN GRADE OF.—If a public highway is so laid out as to indicate that it is designed for permanent use by the public without substantial alteration, and an abutting owner improves his property with reference thereto, and to its reasonable improvement in the future for the public convenience, any subsequent change in the grade substantially impairing his passage to and from the highway is an injury to his property for which he is entitled to compensation. *Smith* v. *Commissioners*, 699.

HOMESTEAD.

1. A HOMESTEAD IS NOT EXEMPT FROM A LIEN IN FAVOR OF A MATERIALMAN who furnished materials to be used in the improvement thereof and can, therefore, be directed to be sold in satisfaction of such lien. *Bonner* v. *Minnier*, 441.
2. A PARTNER IS ENTITLED AS AGAINST CREDITORS OF THE FIRM to claim and hold a homestead in the partnership real estate. *Ferguson* v. *Speith*, 459.

See JUDGMENT, 8; MORTGAGES, 2.

HOMICIDE.

1. AIDING AND ABETTING.—In the absence of a conspiracy, one who is present when a homicide is committed by another, upon a sudden quarrel or in the heat of passion, is not guilty of aiding or abetting the homicide, although he may be involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act. *Woolweaver* v. *State*, 667.
2. MURDER—KILLING OF PERSON NOT INTENDED.—When one person forms a deliberate purpose to kill another, and fires a pistol at him for that purpose, the fact that the ball misses its intended victim and kills another person does not relieve the murderer. *Commonwealth* v. *Breyessee*, 729.
3. MURDER—EVIDENCE—CREDIBILITY OF DEFENDANT.—On a trial for murder the extent to which the accused is contradicted by the witnesses, the character of the testimony given by them, the reasonableness of his own testimony, and its consistency with the established facts in the case, are all proper subjects for consideration by the jury in determining the credit to which his testimony is entitled. *Commonwealth* v. *Breyessee*, 729.
4. MURDER—EVIDENCE—THREATS.—On a trial for murder an overt act or hostile demonstration on the part of the deceased against the accused must be proved, before communicated threats by the former against the latter are admissible in evidence. *State* v. *Harris*, 259.
5. MURDER—EVIDENCE—THREATS.—In a murder case it is within the discretion of the trial court to determine whether a hostile demonstration had been made by the deceased against the accused so as to make communicated threats by the former against the latter admissible in evidence. *State* v. *Harris*, 259.
6. MURDER—SELF-DEFENSE.—Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. *Commonwealth* v. *Breyessee*, 729.

See EVIDENCE, 10.

HUSBAND AND WIFE.

See JUDGMENTS, 8; MARRIAGE AND DIVORCE.

IMPEACHMENT.

See OFFICERS, 3, 4; WITNESSES, 3–8.

INCOME.

See ESTATES, 2–6; POWERS, 2; WILLS, 3.

INDEMNITY.

See SURETYSHIP, 4.

INDICTMENT.

JOINDER OF FELONIES—ELECTION BETWEEN COUNTS.—While there can be no such joinder of felonies in the same indictment as to include separate transactions in fact, yet, when the relation which the accused sustains to a certain transaction and the facts connected therewith are shrouded in doubt, the indictment may embrace, in separate counts,

separate distinct felonies in connection therewith, and if, on the trial, distinct transactions are developed, the state may, at the request of the accused, be forced to elect upon which count or transaction to prosecute. *McKenzie* v. *State*, 795.

See APPEAL, 2; NEW TRIAL, 1; RAPE, 2.

INDORSERS.

See MARRIAGE AND DIVORCE, 2, 3; NEGOTIABLE INSTRUMENTS, 9, 10.

INFANTS.

See JUDGMENTS, 7; LIMITATIONS OF ACTIONS, 5; MASTER AND SERVANT, 3, 4; RAILROADS, 20, 21.

INFORMATION.

See RAPE, 2.

INJUNCTIONS.

MUNICIPAL CORPORATIONS—INJUNCTION AGAINST.—A city may be enjoined to prevent it from maintaining a multiplicity of prosecutions under an invalid ordinance. *South Covington etc. Ry. Co.* v. *Berry*, 161.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CONTRACTS, 12.

INQUISITION.

See INSANE PERSONS, 3.

INSANE PERSONS.

1. CONSTITUTIONAL LAW—JURY TRIAL—LUNACY.—A statute providing that a commission *de lunatico inquirendo* shall be executed before a jury of twelve men does not violate the right of trial by a jury of twenty-four men as guaranteed by the constitution. *De Hart* v. *Condit*, 545.
2. LUNACY—JURY TRIAL.—A finding of lunacy concurred in by twelve jurymen is not defeated by the fact that only eleven of them visited the alleged lunatic for personal examination. *De Hart* v. *Condit*, 545.
3. LUNACY—FINDING OF—RIGHT TO TRAVERSE.—When a reasonable doubt exists as to the propriety of a finding of lunacy made by a jury, the alleged lunatic should be allowed to traverse the inquisition. *De Hart* v. *Condit*, 545.
4. DEED OF INSANE PERSON—AVOIDANCE OF—EVIDENCE.—The record of statutory proceedings adjudging a person insane and a fit subject for treatment in a hospital for the insane, is not admissible in evidence to prove the insanity of such person in an action to avoid a deed made by him. *Dewey* v. *Allgire*, 468.
5. DEED OF—AVOIDANCE OF BONA FIDE PURCHASER—RESTITUTION OF CONSIDERATION.—The deed of an insane person may be avoided as against his grantee without notice and as against an innocent purchaser from such grantee without restitution of the consideration paid by the last purchaser. *Dewey* v. *Allgire*, 468.
6. AVOIDANCE OF—DEED OF.—In the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, does not avoid his deed; but it may be avoided for actual insanity inducing the conveyance,

although the evidence does not show an absolute want of reason and understanding at the time of its execution. *Dewey* v. *Allgire*, 468.

See BONDS, 2.

INSOLVENCY.

SECRET TRUST FOR DEBTOR—RIGHTS OF CREDITORS—ESTOPPEL.—Acceptance by creditors of their share of their debtor's assets in an action brought by his assignee in insolvency to settle the trust does not estop them from subjecting to their claims goods sold by such assignee to one who purchased them for and with the money of the debtor, and it makes no difference that the goods sought to be subjected to their claims are not the identical ones obtained from the assignee. *Rothschild* v. *Kohn*, 184.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

INSTRUCTIONS.

See APPEAL, 8; CONTRACTS, 7; JUSTICES OF THE PEACE.

INSURANCE.

1. VACATION OF PREMISES—NOTICE, WHEN MUST BE GIVEN.—A policy of fire insurance providing that the insurer shall not be liable for loss "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company and consent indorsed thereon," notice must be given within a reasonable time after vacancy, and if so given the policy remains in force until consent is refused by the insurer. In such case immediate notice must be construed to mean notice within a reasonable time, in view of the circumstances and positions of the parties in respect to means of communication with each other. What would be reasonable time as between the parties living in the same city or having ready means of communication would be very unreasonable if applied to an insured who lives a considerable distance from a postoffice, or a railroad, or the agent of the company who has placed the insurance. *Strunk* v. *Fireman's Ins. Co.*, 721.

2. NOTICE OF VACATION OF PREMISES—ACTS OF AGENT AFTER TERMINATION OF AGENCY.—Though the failure of the agent of the insurer who has placed the insurance to notify the insured of the termination of his agency, when requested to notify the insurer of a vacation of the premises in compliance with a policy requiring immediate notice of such vacation to be given, does not continue his agency as far as the insured is concerned, yet the acts performed by such supposed agent for the purpose of transmitting notice to the insurer is proper evidence to show how notice was sent, and that reasonable promptness and diligence was exercised by the insured in giving notice. *Strunk* v. *Fireman's Ins. Co.*, 721.

3. PROOFS OF LOSS ARE PROPERLY RECEIVED IN EVIDENCE and submitted to the jury for the purpose of showing compliance in respect to them with the conditions of the policy. They are also relevant when the defense is interposed that the plaintiff has been guilty of having sworn falsely therein. *Hennessy* v. *Niagara etc. Ins. Co.*, 892.

4. ARBITRATION, DEMAND FOR, WHEN UNNECESSARY.—Though a policy of insurance declares that in the event of a disagreement as to the amount

of the loss it shall be ascertained by appraisers, yet if an insurer denies all liability, and does not demand the appointment of appraisers, an action may be sustained against him without first procuring an appraisement to fix the amount of his loss. *Hennessy* v. *Niagara etc. Ins. Co.*, 892.

5. MARINE INSURANCE—FORFEITURE FOR FAILURE TO PAY PREMIUM.—A policy of marine insurance, providing that it shall be void upon the failure of the insured to pay the premium within a certain time after maturity and demand, is not rendered void, but voidable only, by a breach of such condition, and the insurer may elect to continue the policy in force, notwithstanding the default in the payment of the premium. *Louisville Underwriters* v. *Pence*, 176.

6. MARINE INSURANCE—NEGLIGENCE OF MASTER AS AVOIDING POLICY.—When a marine policy insures against the perils or "unavoidable dangers" of the sea or river, the mere neglect of those in charge of the vessel, in making a landing or otherwise, does not free the insurer from liability. *Louisville Underwriters* v. *Pence*, 176.

7. MARINE INSURANCE—ABANDONMENT—WHAT CONSTITUTES.—An abandonment of an insured vessel as for a total loss, to give the insured the right to claim the full amount of insurance, must include not only an intention to abandon, but a relinquishment of all right to the property, and although the insured may give notice to the insurer of an intention to abandon, yet, if he all the time continues to hold against the right of the latter, and to claim and use the property as his own, there is, in fact, no abandonment; and he can recover upon the policy only what may in fact be his loss. *Louisville Underwriters* v. *Pence*, 176.

8. MARINE INSURANCE—ABANDONMENT, WHEN VALID.—If, in all probability, the expenditures that must be incurred to deliver an insured vessel from peril will be more than half her value, and if her peril is such that a considerate owner, if uninsured, would not attempt to save her because of such great expense, an abandonment as for a total loss is valid, under a policy of insurance providing that there shall be no abandonment, as for a total loss, unless the injury sustained is equal to fifty per cent of the agreed value of the policy. In such case the fact that the vessel does not ultimately prove an absolute or total loss does not defeat the claim for the insurance. *Louisville Underwriters* v. *Pence*, 176.

9. LIFE—CONTRACT FOR, WHEN NOT COMPLETE.—If it is agreed between an applicant for life insurance and a local agent that an application shall be sent to the insurer representing the premiums as paid in cash when in fact the agent has accepted premium notes, and the policy is issued and sent to such agent who, becoming distrustful of the financial solvency of the assured, enters into an agreement with him whereby the note is surrendered and the policy returned to the insurer and canceled, such policy has never become a perfected contract, and its surrender and cancellation, though without the assent of a person other than the assured named therein as beneficiary, prevent any liability from arising against the insurer if the applicant had agreed that any policy which should be issued under his application should not be enforced until the actual payment of the premium. *Griffith* v. *New York etc. Ins. Co.*, 96.

10. LIFE—WAIVER OF PAYMENT.—A provision in a policy of insurance that the insurer shall not be liable thereon until the premium is actually paid is waived by an unconditional delivery of the policy to the as-

sured as a completed contract under an express or implied agreement that credit shall be given. *Griffith* v. *New York etc. Ins. Co.*, 96.

11. LIFE—WAIVER BY INSURER, STATUTORY RIGHTS.—If a statute declares that no life insurance company shall have the power to declare forfeited or lapsed any policy by reason of nonpayment of premiums, unless notice shall be given as in the statute stated, any contract between the company and the assured stipulating for a forfeiture of the policy in the absence of such notice is *ultra vires* and void. The statute indicates the legislative will that, as a matter of public policy, life insurance corporations shall be deprived of the power to declare forfeited policies of insurance for the nonpayment of premiums except in the prescribed mode, and a waiver on the part of the assured cannot be considered to confer a power which the statute has taken away. *Griffith* v. *New York etc. Ins. Co.*, 96.

12. LIFE—NONPAYMENT OF NOTE GIVEN FOR PREMIUM.—If insurance is effected on the life of the assured and a policy delivered on the assumption that the premium has been paid in cash, when such payment has in fact been made to a local agent by a note which he has received as cash, and he has become liable to his principal for the amount thereof, this, as against the insurer, is equivalent to proper payment to the local agent, and the nonpayment of the note at maturity cannot work a forfeiture of the policy, nor can it support a surrender of the policy made without the consent of the person named therein as beneficiary. *Griffith* v. *New York etc. Ins. Co.*, 96.

13. LIFE—SURRENDER OF POLICY WITHOUT ASSENT OF THE BENEFICIARY.—If a policy of insurance is regularly delivered in pursuance of a consummated contract to one who has procured insurance upon his own life payable to another, the assured cannot surrender the policy without the consent of the beneficiary. *Griffith* v. *New York etc. Ins. Co.*, 96.

14. SUFFICIENCY OF COMPLAINT—LOSS PAYABLE TO MORTGAGEE.—As against general demurrer a complaint alleging that the property insured has been totally destroyed, and that a mortgagee, to whom the loss is payable under the policy, has sustained loss and damage in a specified sum, sufficiently alleges loss and damage to the insured owner. *Maxcy* v. *New Hampshire etc. Ins. Co.*, 325.

15. LOSS PAYABLE TO MORTGAGEE—PARTIES.—A policy of insurance by the terms of which a loss thereunder is made payable to a mortgagee is a contract for the benefit of the mortgagee, and either he or his assignee can enforce the liability in his own name to the amount of the mortgage debt without joining the insured as a party. *Maxcy* v. *New Hampshire etc. Ins. Co.*, 325.

16. PROHIBITED BY THE LAWS OF A STATE.—If the laws of a state regulating the business of insurance therein declare that all insurance effected by foreign corporations which have not complied with such laws is unlawful, void, and of no effect whatever, a policy issued in violation of this rule is void not only in that state, but in every other, and hence no recovery can be had thereon in the state in which such corporation was organized. *Wood* v. *Cascade etc. Ins. Co.*, 917.

17. STATUTES REGULATING CONSTRUCTION.—A statute providing that "no company" shall transact an insurance business within the state without having received proper license to do so from the state insurance super-

intendent, includes individuals or associations of individuals, as well as incorporated companies. *State* v. *Stone*, 388.

18. RIGHT OF STATE TO REGULATE.—A statute prohibiting one from acting as agent or solicitor for any individual, association of individuals, or corporation in the transaction of insurance business within the state, unless such agent has obtained from the state superintendent of insurance a certificate authorizing him to so act, or before such individual, association of individuals, or corporation shall have been duly authorized and licensed by such superintendent to transact insurance business in the state, and providing that a violation of the terms of such statute shall constitute a misdemeanor, is a valid exercise of the right of a state to regulate insurance business within its limits. *State* v. *Stone*, 388.

19. RIGHT OF STATE TO REGULATE.—A state has the right to prescribe reasonable conditions upon which insurance business may be carried on within its limits by individuals as well as by corporations, provided it does not discriminate between citizens of equal standing and merit within or without the state. *State* v. *Stone*, 388.

INTEREST.

INTEREST ON MONEY, after it is due, is recoverable as a matter of legal right. *Wood* v. *Cascade etc. Ins. Co.*, 917.

JEOPARDY.

See JUDGMENTS, 10.

JOINDER.

See INDICTMENT.

JUDGMENTS.

1. JUDGMENT UPON CONSTRUCTIVE SERVICE OF PROCESS based on an affidavit to procure the service of summons by publication which states "that the defendant has departed from this state and cannot be found therein," is insufficient to support a judgment based thereon, and such judgment is absolutely void. It is essential that the affidavit should state probative facts from which the court may draw the conclusion that due diligence has been used to ascertain the whereabouts of the defendant and that he cannot be found within the state. *Palmer* v. *McMaster*, 434.

2. A JUDGMENT BASED UPON A SUMMONS NOT ATTESTED BY THE SEAL of the court is void, and a deed pursuant to a sale under execution issued upon such judgment will be canceled in equity as a cloud upon complainant's title. *Choate* v. *Spencer*, 425.

3. FRAUD IN OBTAINING—COLLATERAL ATTACK.—A judgment or decree obtained by fraud is not void in the sense that it can be assailed in a strictly collateral proceeding. It is voidable at the election of the injured party only, and not absolutely void. *Smithson* v. *Smithson*, 504.

4. EQUITABLE RELIEF AGAINST.—A court of equity cannot vacate a judgment at law merely on the ground that the process in the suit in which such judgment was rendered was not served on the defendant as shown by the officer's return. In such case the judgment defendant

must, in order to obtain relief, allege and prove that he had a meritorious defense to the action at law. *Janes* v. *Howell*, 494.

5. JUDGMENTS OBTAINED BY FRAUD—RELIEF IN EQUITY, WHAT COURT MAY GRANT.—A person against whom a judgment or decree has been obtained by fraud must seek relief in the court in which the judgment or decree was rendered, and an independent suit to annul the judgment and for other relief cannot be maintained in another court possessing the same jurisdiction, or in another court possessing general equity jurisdiction. *Smithson* v. *Smithson*, 504.

6. JUDGMENTS BY DEFAULT—VACATING IN EQUITY.—A judgment taken by default after settlement between the parties, contrary to plaintiff's promise to dismiss the action, relied upon by defendant, may be vacated and set aside in equity when statutory proceedings are inadequate to afford relief. *Cadwallader* v. *McClay*, 496.

7. JUDGMENTS BY DEFAULT—VACATING FOR FRAUD.—A judgment taken by default after settlement between the parties, contrary to plaintiff's promise to dismiss the action, relied upon by defendant, may be vacated and set aside, although the judgment plaintiff is an emancipated infant. *Cadwallader* v. *McClay*, 496.

8. MARRIED WOMEN—CONCLUSIVENESS OF JUDGMENT AGAINST.—A judgment by default rendered against a married woman and her husband decreeing a sale of their homestead under mortgage foreclosure cannot at her instance be set aside at a subsequent term of the court on the ground that the mortgage or its acknowledgment by the wife was void. Such judgment after the expiration of the term is *res judicata*, even as to such married woman. *Davis* v. *Jenkins*, 197.

9. CRIMINAL LAW—JEOPARDY—PROSECUTION UNDER ORDINANCE.—The same act committed by a person may constitute a crime against the state law and a different petty offense against municipal regulation; and the two offenses being different, each may be punished separately without violating a constitutional prohibition against placing one twice in jeopardy for the same offense. *State* v. *Fourcade*, 249.

See ADMIRALTY; ATTACHMENT, 8; CORPORATIONS, 21; EQUITY, 4, 5; JUDICIAL SALES; LIMITATIONS OF ACTIONS, 2; MARRIAGE AND DIVORCE, 7, 8.

JUDICIAL NOTICE.

See EVIDENCE, 4–7.

JUDICIAL SALES.

IF IT APPEARS THAT A JUDGMENT HAS BEEN ENTERED, and an execution issued thereon under which a sale was made, and afterwards confirmed by the court, it will be presumed that the proceedings leading up to such sale were regular. *Tacoma Grocery Co.* v. *Draham*, 907.

See EQUITY, 4; EXECUTION, 3.

JURISDICTION.

1. INSUFFICIENCY OF PETITION.—The probate court cannot acquire jurisdiction to proceed against a child or its natural or legal guardian for the purpose of committing it to the state public school when the petition or application upon which the proceeding rests is wholly inadequate and insufficient. *State* v. *Kinmore*, 205.

2. CONFLICT BETWEEN FEDERAL AND STATE COURTS. — State courts and the judges thereof have no jurisdiction or power under *habeas corpus*, or otherwise, to discharge persons who are held in custody by authority of the federal courts, or by authority of commissioners thereof, or by officers of the United States acting under the laws thereof, although the judgments or orders of the federal courts or commissioners are illegal. The remedy in such cases is only in the United States courts. *In re Copenhaver*, 382.

See ADMIRALTY, 3; ASSIGNMENT FOR THE BENEFIT OF CREDITORS; ATTACHMENT, 4–6; CONTEMPT, 4; EQUITY, 1, 2; EXECUTORS AND ADMINISTRATORS, 2; HABEAS CORPUS, 3, 4; LARCENY, 4; MARRIAGE AND DIVORCE, 6.

JUSTICES OF THE PEACE.

IF A JUSTICE OF THE PEACE INSTRUCTS A JURY he must instruct them correctly, otherwise the judgment, which is probably the result of the erroneous instruction, will be set aside. *Hirth* v. *Graham*, 641.

JURY AND JURORS.

See TRIAL.

KNOWLEDGE.

See CORPORATIONS, 19.

LACHES.

See EQUITY, 7; LIMITATIONS OF ACTIONS, 5, 6.

LANDLORD AND TENANT.

OIL LEASE, because of the fugitive and wandering existence of the oil within the limits of the tract of land leased, partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying solid minerals. *Wettengel* v. *Gormley*, 733.

LARCENY.

1. KILLING ANIMAL TO CONCEAL PREVIOUS THEFT.—The taking and destruction of an animal from an innocent purchaser, by the party who originally stole and sold it, the second taking being to conceal the first theft, constitutes larceny. *Stegall* v. *State*, 761.

2. DESTRUCTION OF PROPERTY STOLEN TO CONCEAL THEFT.—To constitute the felonious taking in larceny it is not necessary that the taking should be done *lucri causa;* a taking with intention to destroy the property to conceal the evidence of a previous theft thereof, if done for the benefit of the offender or another person, is sufficient to constitute larceny though no pecuniary benefit arises therefrom. *Stegall* v. *State*, 761.

3. EVIDENCE—UNRECORDED MARK OR BRAND ON ANIMAL STOLEN.—On a trial for larceny in bringing an animal stolen in one state into another, where the statute provides that an unrecorded stock brand or mark shall not be any evidence of the ownership of any animal upon which it appears, the brand on the animal stolen, if not recorded in such state where the prosecution takes place, is not admissible as evidence of ownership for any purpose, whether the statutes of both states on the subject are the same or not. *McKenzie* v. *State*, 795.

4. BRINGING STOLEN PROPERTY INTO STATE.—A person may be prosecuted and punished in Texas for larceny committed by stealing property beyond its boundaries and bringing it into that state. The county in which the accused is found is the county in which he should be prosecuted. *McKenzie* v. *State*, 795.

LAWYERS.

See ATTORNEY AND CLIENT.

LEASE.

See DEVISE; LANDLORD AND TENANT.

LEGISLATURE.

1. A LEGISLATIVE ACT is one which predetermines what the law shall be for the regulation of future cases falling within its provisions, while a judicial act is a determination of what the law is in relation to some existing thing done or happened. *Wulken* v. *Board of Supervisors*, 17.
2. CONSTITUTIONAL LAW—CURATIVE STATUTES.—If the thing wanted or failed to be done, and which constitutes the defect in the proceeding, is some thing, the necessity for which the legislature might have dispensed with by prior statutes, then it is not beyond the power of the legislature to dispense with it by a subsequent statute; and if the irregularity consists of not doing some act or in the manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. *Gordon* v. *San Diego*, 73.
3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LEGISLATIVE QUESTIONS.—The legislative authority has a perfect right, without any notice to the parties to be affected by its action, to open up a street and to determine the district to be affected thereby and made chargeable therefor. *Wulken* v. *Board of Supervisors*, 17.

See CORPORATIONS, 3; MUNICIPAL CORPORATIONS, 2, 3, 5–7; OFFICERS, 3, 4; STATUTES.

LIBEL.

A DEFENDANT MAY SHOW PROVOCATION FOR AN ALLEGED LIBEL, consisting of prior publications against himself of a provoking character, and to which the plaintiff contributed. *De Camp* v. *Archibald*, 692.

LICENSE.

See INSURANCE, 17.

LIEN.

DEFENSES.—One who may defend against a lien may object that the lien had expired, or the remedy upon it was lost, before the action was commenced against him. *Hokanson* v. *Gunderson*, 354.

See ASSIGNMENT; CORPORATIONS, 9–11; MARRIAGE AND DIVORCE, 7; MORTGAGES.

LIFE-TENANTS.

See ESTATES; POWERS, 2; WILLS, 3, 4.

LIMITATIONS OF ACTIONS.

1. EQUITABLE PROCEEDINGS.—The statute of New York attaching limitations to numerous classes of actions, and then adding "an action, the limitation of which is not specifically prescribed in this or the last title, must be commenced within ten years after the cause of action accrues," subjects all actions, whether legal or equitable, to some statutory limitation. *Gilmore* v. *Ham*, 554.

2. A JUDGMENT CREDITOR'S CAUSE OF ACTION TO SET ASIDE A TRANSFER AS FRAUDULENT as against him does not accrue until he has recovered judgment, and execution has issued thereon, and been returned unsatisfied. Therefore, until such judgment and return, the statute of limitations applicable to his action does not begin to run. *Wenner* v. *Haviland*, 631.

3. PARTNERSHIP.—THE STATUTE OF LIMITATIONS RUNS AGAINST A SUIT BY A RETIRING PARTNER against a liquidating partner for an accounting, from the date when it was the duty of the latter to have had the business in a condition for its complete settlement, and the operation of the statute is not postponed by the fact that he leaves one or more of the partnership obligations unsettled, which are subsequently enforced in an action against the retiring partner by which he is compelled to pay the amount thereof. *Gilmore* v. *Ham*, 554.

4. PARTNERSHIP—STATUTE OF LIMITATIONS IN SUITS FOR AN ACCOUNTING. If, after the dissolution of a partnership, all of its members act as liquidators with equal rights and duties, and neither is guilty of any wrong in the process of liquidation, a cause of action by one against the other for an accounting does not exist until the liquidation is substantially complete. Therefore, though one of them had, prior to the dissolution, withdrawn moneys from the firm without right as between himself and his copartner, the latter may, by a suit for an accounting brought as soon as a complete adjustment of the partnership affairs was possible, recover moneys so withdrawn. The statute of limitation against such suit does not begin to run at the time of the withdrawal of the moneys, nor at the dissolution of the partnership, nor from any date prior to the time when a complete adjustment of its affairs can be made, if there has been no demand made for the return of the moneys withdrawn and no refusal to account for them before the complete adjustment of the partnership business became possible, and such adjustment was not delayed by the fault of either partner. *Gray* v. *Green*, 596.

5. LACHES.—If at the time a conveyance is made to an infant a parol agreement is entered into between his father and the person paying the consideration for the conveyance that in the event of the death of the child while a minor and the father becoming its heir, the latter would, on demand, convey the property to such person, and the child some four years afterwards and while an infant dies, and the father thereupon in the same year removes from the state and continues absent therefrom, and a demand for a conveyance is made upon him twenty-four years later, and an action then begun to compel such conveyance, such action is barred by the laches of the complainant, though, owing to the absence of the defendant from the state, no statute of limitations is applicable to the suit. *Seculovich* v. *Morton*, 106.

6. LACHES.—Though, as a general rule, the statute of limitations does not run against an express trust where there is concealed fraud, yet, if the injured party has been guilty of great laches in the prosecution of his

remedy, he will be barred in equity on account of the paramount importance of having title settled. *Seculovich* v. *Morton*, 108.

See CHECKS, 8; TELEGRAPH COMPANIES, 3.

LIS PENDENS.

1. LIS PENDENS AS NOTICE.—In an action to enforce a mechanic's lien, a notice of *lis pendens* filed is not binding upon one claiming an interest in the premises, unless he is a party to the action served with summons or voluntarily appearing therein, or claiming under one who was made a party during the life of the lien. Mere notice of the suit does not affect him unless he is thus actually made a party. *Hokanson* v. *Gunderson*, 354.
2. The commencement of an action and the suing out of summons by a creditor to subject to his claim property of his debtor, held under a secret trust by another, creates an equitable *lis pendens*, if the property is specifically described in the petition, and one who purchases or takes a mortgage on such property from the fraudulent trustee pending the action is a *lis pendens* purchaser. *Rothschild* v. *Kohn*, 184.
3. Under the Kentucky statute an equitable *lis pendens* is acquired in a suit to subject specific property to the payment of a debt, by filing a petition and suing out summons. *Rothschild* v. *Kohn*, 184.
4. EFFECT ON FORECLOSURE PURCHASER.—A purchaser at mortgage sale is not bound by an action against the mortgagor involving the title to the mortgaged premises, nor by a *lis pendens* filed in such action, when neither such purchaser nor the mortgagee are made actual parties until after such foreclosure. *Hokanson* v. *Gunderson*, 354.

LOGS.

See CUSTOM, 2; ESTOPPEL, 1; WATERS.

LUNACY.

See INSANE PERSONS.

MANDAMUS.

1. A MANDAMUS IS a command issued from a court directed to some person, corporation, or inferior court within the jurisdiction of the superior court requiring such person, corporation, or inferior court to do some particular thing therein specified. *Swift* v. *Richardson*, 127.
2. THE WRIT OF MANDAMUS issues only when there is a clear and specific right to be enforced or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. *Swift* v. *Richardson*, 127.
3. THE WRIT OF MANDAMUS IS IN DELAWARE DIVESTED OF ALL ITS PREROGATIVE FEATURES, and issues whenever necessary for the enforcement of a remedy by a person having a legal right against another withholding that right. *Swift* v. *Richardson*, 127.
4. MANDAMUS MAY ISSUE IN THIS STATE TO ENFORCE THE RIGHT OF A NON-RESIDENT STOCKHOLDER to inspect and take copies of documents of a foreign corporation, if they are in this state and in the custody of the person to whom the writ is directed. *Swift* v. *Richardson*, 127.
5. A MANDAMUS AGAINST A CORPORATION TO ENFORCE THE RIGHT OF A STOCKHOLDER to inspect and take copies of corporate documents should

be directed to the person or officer having the custody thereof, though he is merely a ministerial officer acting by the direction of other officers, and the corporation itself need not be made a party to the proceedings by which the writ is sought. *Swift* v. *Richardson*, 127.

See CORPORATIONS, 13–15; MUNICIPAL CORPORATIONS, 25; PLEADING, 1, 2.

MARRIAGE AND DIVORCE.

1. A MARRIAGE PROHIBITED BY STATUTE is invalid, though contracted in a place where the statute is not in force, if the contracting parties went beyond their domicile to contract their marriage for the purpose of avoiding the prohibition. *In re Wilbur's Estate*, 886.

2. A MARRIAGE BETWEEN A WHITE MAN AND AN INDIAN WOMAN, if prohibited by the law of the state or territory, is void, though she was at the time a member of a tribe living with her people upon a reservation set apart for them, and the marriage was contracted in the form proper for a valid marriage had both the parties thereto been Indians. *In re Wilbur's Estate*, 886.

3. MARRIAGE, REPEAL OF STATUTE PROHIBITING.—Though a statute prohibiting a marriage between an Indian and a white person is repealed after such a marriage has been contracted it remains unlawful and invalid, and there is no presumption of a subsequent marriage arising from the fact that the parties continued their cohabitation for several years after such repeal. *In re Wilbur's Estate*, 886.

4. MARRIAGE—BREACH OF CONTRACT—DEFENSES.—It is implied in every contract to marry that any subsequent change in the mental or physical condition of either party, without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, releases the parties from the agreement. *Shackleford* v. *Hamilton*, 166.

5. MARRIAGE — BREACH OF CONTRACT — DEFENSES. — The reappearance of syphilis in a man, without his fault, after he has agreed to marry, believing in good faith that he has been cured of such disease, releases him from his contract, and is a good defense to an action against him for breach of his contract to marry. *Shackleford* v. *Hamilton*, 166.

6. A JUDGMENT OF DIVORCE GRANTED IN ANOTHER STATE against a wife over whom the courts did not have jurisdiction, while it may dissolve the marriage relation existing between the parties, cannot affect her rights in the property of her husband situate in this state. *Doerr* v. *Forsythe*, 703.

7. JUDGMENT FOR ALIMONY—LIEN OF.—If in a final decree of divorce a wife is awarded a gross sum as alimony, such sum is a lien upon the husband's real property, if by the statute of the state every final determination of the rights of the parties is declared to be a judgment, and every judgment to be a lien upon the lands and tenements of the debtor in the county wherein the judgment is entered. *Conrad* v. *Everich*, 679.

8. A JUDGMENT FOR ALIMONY IS A DEBT OF RECORD as much as any other judgment for money is. *Conrad* v. *Everich*, 697.

See EQUITY, 3.

MARRIED WOMEN.

See ACKNOWLEDGMENTS, 2; MORTGAGES, 2.

MASTER AND SERVANT.

1. INDEPENDENT CONTRACTORS.—If an independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages for the injury. *James* v. *McMinimy*, 200.

2. LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—If a contractee employs an independent contractor to do work for his benefit, which, in the ordinary mode of doing it, he as a prudent man has reason to believe is a nuisance, he is liable for injuries resulting from it to third persons; but when he has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out that during the progress of the work it is necessary to create a nuisance in order to do it, the contractee is not liable for injuries to third persons resulting from the nuisance before he has notice of its existence. Upon receiving such notice he must take such reasonably prompt and efficient means as are in his power to suppress the nuisance to relieve himself from liability for subsequent injuries to third persons. *James* v. *McMinimy*, 200.

3. MINOR EMPLOYEES—NEGLIGENCE.—In an action by a minor employee over fourteen years of age to recover damages from his employer for personal injury it cannot be assumed, as a matter of law, that such minor with six months' experience in a machine-shop is incapable of forming a judgment of the danger of going up a ladder to put a belt on a pulley, especially when he has the aid of a warning given by an older and more experienced workman. *Greenway* v. *Conroy*, 715.

4. MINOR EMPLOYEES—MEASURE OF RESPONSIBILITY.—The measure of a child's responsibility is his capacity to see and appreciate danger, and, in the absence of evidence of lack of capacity, he is held to such measure of discretion as is usual in those of his age and experience. This measure varies with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen years. That is simply the point at which the law, founded upon experience, changes the presumption of capacity, and casts upon the minor the burden of showing his personal want of experience, prudence, foresight, or strength usual in those of his age. *Greenway* v. *Conroy*, 715.

5. A MASTER CANNOT BY ADOPTING RULES AND REGULATIONS for the proper performance by his agents of an act or duty resting upon such master exonerate himself from liability for the negligence of such agent in such performance. *Hankins* v. *New York etc. R. R. Co.*, 616.

6. THE LIABILITY OF A MASTER for the negligence of his servant, whereby another servant is injured, does not depend upon the doctrine of *respondeat superior*, but upon the omission of some duty of the master which is deputed to such inferior employee. If the act omitted is one of the kind which the master owes to his employee the duty of performing, he is responsible to the employee for the manner of its performance. It is not a question of rank among the different employees. *Hankins* v. *New York etc. R. R. Co.*, 616.

7. A SERVANT MAY RECOVER DAMAGES FOR THE NEGLIGENCE OF HIS FELLOW-SERVANT if the latter was unskilled and incompetent to discharge his duties, and this was known to the master or could have

been known to him by due care, and was not known to the injured servant. *Campbell* v. *Cook*, 878.

3. FELLOW-SERVANTS.—To his servant a master is liable for negligence in respect to those acts or duties he is required to perform as master, without regard to the rank or title of the agent to whom he has intrusted the performance of such duties or acts. *Hankins* v. *New York etc. R. R. Co.*, 816.

4. LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANTS.—An employee is not entitled to recover damages from his employer for personal injuries caused by the negligence of a fellow-workman who has no general authority or control over the men, and differs from them only in that a part of the work requiring to be marked and laid out first passes through his hands, and that upon rare occasions he has charge of the shop when the employer, who is his own superintendent, is away, if, at the time of the accident, the employer is present and in charge of the shop. *Greenaway* v. *Conroy*, 715.

See EVIDENCE, 2; RAILROADS, 9–15; STATUTES, 9, 20, 21.

MECHANIC'S LIEN.

MORTGAGE LIENS—PRIORITY.—When, between the time of the execution and recording of a mortgage and the issue of mortgage bonds thereon, mechanic's lien attaches to the mortgaged premises, the holders of such mortgage bonds, without actual notice of the mechanic's lien, have a lien on the mortgaged premises relating back to the time when the mortgage was recorded, prior and superior to that of the mechanic's lien. *Central Trust Co.* v. *Continental Iron Works*, 539.

See HOMESTEAD, 1; LIS PENDENS, 1.

MINES.

See LANDLORD AND TENANT.

MISDEMEANOR.

See INSURANCE, 18; OFFICERS, 5.

MISTAKE.

See BIGAMY, 2; EQUITY, 6.

MORTGAGES.

1. MORTGAGES FOR FUTURE ADVANCES—PRIORITY OF LIENS.—Mortgages for future advances operate from the time of recording, although the advances are not made until a subsequent date, and they have priority for all advances made before actual notice of subsequent encumbrances. *Central Trust Co* v. *Continental Iron Works*, 539.

2. MARRIED WOMEN—MORTGAGES—WAIVER OF HOMESTEAD AND DOWER. A mortgage signed and acknowledged by the wife of a mortgagor, containing apt words waiving her right of homestead and dower, is binding upon her although her name does not appear in the granting clause. *Davis* v. *Jenkins*, 197.

3. FORECLOSURE—RIGHTS OF PURCHASER.—A purchaser at foreclosure sale succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee pre-

closely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure. *Hokanson* v. *Gunderson*, 354.

4. FORECLOSURE—RIGHTS OF PURCHASER.—A purchaser at foreclosure sale is only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee. The purchaser's rights are not affected by liens adjudged against the mortgagor in a suit commenced subsequently to the date of the mortgage to which neither he nor the mortgagee is a party. *Hokanson* v. *Gunderson*, 354.

See ACKNOWLEDGMENTS, 1; BANKS, 6; BONDS; CHATTEL MORTGAGES; CONFLICT OF LAWS, 1; CORPORATIONS, 21; EQUITY, 5, 7; INSURANCE, 14, 15; JUDGMENTS, 8; LIS PENDENS, 4; MECHANICS' LIENS; NEGOTIABLE INSTRUMENTS, 2; SUBROGATION, 2; SURETYSHIP, 3.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION MAY BE DEFINED TO BE a body politic and corporate established by law to assist in the government of the state, with delegated authority to regulate and administer to the local and internal affairs of a city, town, or district which is incorporated. *Coyle* v. *McIntire*, 109.

2. CONSTITUTIONAL LAW.—ALL THE AGENCIES OF THE STATE MAY BE ABOLISHED or changed at the will of the legislature and even their functions may be assigned to other and different agencies. *Coyle* v. *McIntire*, 109.

3. A MUNICIPAL CORPORATION HAS NO VESTED RIGHT to any of its powers or franchises, but is subject to the control of the legislature, which may enlarge or diminish its territorial extent or its functions, and change or modify its internal arrangement, or destroy its very existence at discretion. *Coyle* v. *McIntire*, 109.

4. THE RIGHT OF PROPERTY OF A MUNICIPAL CORPORATION is not a private right of property in the sense in which property is said to be private, when held by an individual citizen. The property of a municipality is private only in the sense that it is exempt from being taken and applied to any other public use by the state or by authority of the state without compensation being made, and from being taken away and given to other corporations or persons. *Coyle* v. *McIntire*, 109.

5. LEGISLATIVE CONTROL OF PROPERTY OF.—There is no limit to the control which the legislature may exercise over property acquired and held by a municipal corporation, provided such control is consistent with the preservation of the property or of its proceeds for the uses and purposes for which it was acquired and the benefit of those for whom it was acquired. *Coyle* v. *McIntire*, 109.

6. CONSTITUTIONAL LAW—VESTED RIGHTS.—The common council of a city cannot, as against the state, have any vested or constitutional right to control or manage its water-works or to appoint those who are to maintain and control them. The legislature may direct these powers to be vested in or exercised by any other department or agency of the city government. *Coyle* v. *McIntire*, 109.

7. DELEGATION OF POLICE POWER TO.—The legislature may delegate to municipal corporations power to adopt and enforce by-laws and ordinances on matters of special local importance, though general statutes exist relating to the same subjects. *State* v. *Fourcade*, 249.

8. ORDINANCES—IMPLIED POWERS.—A municipal corporation cannot, by ordinance, enlarge the powers expressly granted it by its charter any further than is absolutely necessary to carry such powers into effect. *State* v. *Robertson*, 272.

9. PUBLIC CORPORATIONS FOR THE GOVERNMENT OF A TOWN, CITY, OR THE LIKE are to be governed according to the law of the land. They are mere creatures of public institution created exclusively for the public advantage without endowments other than such as the government may bestow upon them. *Coyle* v. *McIntire*, 109.

10. ORDINANCES BEYOND CHARTER POWERS.—In the absence of express authority granted to a city in its charter, it has no power to create, by ordinance, the office of inspector and board of inspectors of boilers and steam apparatus, and to require the owners and users thereof to employ engineers licensed by the city, and to submit such apparatus to inspection and to pay fees therefor. The enforcement of such an ordinance is not within the implied power of the city to protect the general welfare of its inhabitants, and the only implied power possessed by the city in such case is the right to locate such steam apparatus in a safe place, where explosions would do the least injury. *State* v. *Robertson*, 272.

11. THE POWERS of a municipality are confined to those expressly granted, or those essential to the execution of the powers so granted. *South Covington etc. Ry. Co.* v. *Berry*, 161.

12. CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE TO SUPPRESS NEWSPAPER.—A city ordinance declaring a certain newspaper to be a public nuisance, and prohibiting its circulation within the city limits, is unconstitutional and void. *Ex parte Neill*, 776.

13. POWER TO SUPPRESS NEWSPAPERS.—Municipal corporations are not invested with power to declare the sale of newspapers a nuisance, nor to suppress them by prohibiting their circulation within the city limits. *Ex parte Neill*, 776.

14. ORDINANCES—REGULATION OF VARIETY SHOWS.—Although a city charter expressly confers the right upon the city council to prohibit, or to segregate and regulate bawdy-houses and variety shows, yet such right must be exercised in harmony with the criminal laws of the state. *Ex parte Bell*, 778.

15. ORDINANCES REGULATING VARIETY SHOWS.—Under a city charter authorizing its council to prohibit, segregate, and regulate bawdy-houses and variety shows, and determine their keeper and inmates to be vagrants, an ordinance declaring that any place is a variety show where persons congregate together and engage in music and dancing, or plays and exhibitions, and liquor is sold, offered for sale, or given away to any person present or visiting such place, is invalid, as being vague, indefinite, and uncertain, beyond the power conferred by the charter upon the council, and containing none of the essential elements of a disorderly house as defined and denounced by law. *Ex parte Bell*, 778.

16. POWER TO REGULATE VARIETY SHOWS.—Where disorderly houses are defined and forbidden by state law, a variety show, to come within such prohibition, must, in effect, be a disorderly house. Without the elements which make it such it cannot be declared illegal by municipal ordinance, and when these elements exist, the inmates and proprietor may, under proper ordinance, be arrested and convicted of vagrancy, or punished as prescribed by the statute. *Ex parte Bell*, 778.

17. POWER TO REGULATE VARIETY SHOWS.—If a variety show or theater *eo nomine* has never been declared illegal, nor its existence a legal offense, nor a penalty affixed thereto by state law, it is not within the power of a city council, although express power is granted to regulate variety shows, to group together a certain number of acts, innocent in themselves, or not illegal, and, by calling it a variety show, undertake to prohibit it and punish parties engaged therein. The forbidden act must contain such elements as are defined and denounced by law. *Ex parte Bell*, 778.

18. ONE WHO ATTACKS MUNICIPAL ORDINANCES AS UNCONSTITUTIONAL and illegal must plead and show with particularity in what respect they are illegal and unconstitutional. *State* v. *Fourcade*, 249.

19. CHANGE OF GRADE OF STREETS.—Under a statute declaring that the council of a city shall have the care, supervision, and control of all public streets, and shall cause them to be kept open and in repair, such council may change the grade of a street already improved without creating any liability against the municipality in favor of a corporation having gaspipes in the street under an easement granted to it by the city, and which pipes must necessarily be taken up and relaid as a consequence of the change in the grade. *Columbus Gas etc. Co.* v. *Columbus*, 648.

20. A MUNICIPAL CORPORATION CANNOT ABROGATE ITS OWN POWER.—Therefore any grant of an easement to lay pipes in a street is subject to the legislative power of the municipality over such street. *Columbus Gas etc. Co.* v. *Columbus*, 648.

21. EASEMENTS IN PUBLIC STREETS.—The granting of a right to lay and maintain pipes in a public street must be interpreted in the light and duty of the city to regrade whenever, in its judgment, the public interests demand, and the easement must be accepted and received in common with equivalent rights which have been acquired by other public agencies, rights of a secondary character, and all must give way to the paramount duty of the city to care for the streets and keep them open, in repair, and convenient for the general public. *Columbus Gas etc. Co.* v. *Columbus*, 648.

22. CONSTITUTIONAL LAW—NOTICE SUFFICIENT TO SUPPORT PROCEEDINGS FOR OPENING A STREET AND TAKING PROPERTY THEREFOR.—A notice published in a newspaper that the board of supervisors have passed a resolution of intention (giving its number and date), stating the intention of the board to open a designated street, from its present termination, in a southwesterly direction, to the waters of the Pacific ocean, within the boundaries of the city and county named therein, and that all parties interested are referred to said resolution for further particulars, is as specific and certain as is practicable under the circumstances, and is sufficient. To require such notice to name all the persons to be affected and to be served upon them personally would require an impossibility. *Wulzen* v. *Board of Supervisors*, 17.

23. A MUNICIPAL CORPORATION, IN IMPROVING AND CARING FOR A PUBLIC PARK, is exercising a franchise conferred upon it for the public good, and not for its private advantage, and, therefore, is not liable for injuries received by a laborer in such park through the negligence of its officers. *Russell* v. *Tacoma*, 895.

24. DAMAGES FOR CHANGE OF GRADE OF.—A gas company which has been granted the right to lay and maintain its pipes in a public street does not

thereby acquire an easement to maintain them in the place where they are so laid, and therefore cannot recover damages resulting from a subsequent change in the grade of the street the consequence of which will be the taking up and relaying of such pipes. *Columbus Gas etc. Co.* v. *Columbus*, 648.

25. THE ALLOWANCE OF A CLAIM BY A BOARD OF TRUSTEES OF A MUNICIPALITY IS A JUDICIAL ACT involving the determination of the existence of the indebtedness, and such determination is binding upon its clerk, and precludes him from resisting an application for a writ of mandate to compel him to issue a warrant upon such allowance and claim upon the ground that no indebtedness in fact existed. *McConoughey* v. *Jackson*, 53.

26. RESCINDING ALLOWANCE OF CLAIM.—If a claim is properly presented to the trustees of a municipal corporation and allowed and approved by them, and their action accepted by the claimant, it becomes a valid and binding contract, and can be avoided only for a cause sufficient to invalidate other contracts. *McConoughey* v. *Jackson*, 53.

27. ORDINANCES REGULATING STREET RAILWAYS.—An ordinance requiring a street railway company to have both a driver and a conductor on each of its cars is a valid police regulation, and may be enacted under a charter conferring upon the city power to pass all ordinances "necessary for the due and effectual administration of right and justice in said city, and for the better government thereof." *South Covington etc. Ry. Co.* v. *Berry*, 161.

28. ORDINANCE REGULATING STREET RAILWAYS — POLICE POWER — DUE PROCESS OF LAW.—A municipal ordinance rquiring a street railway company to have both a driver and a conductor on each of its cars, and providing that the police of such city shall cause any car without a driver and a conductor to be returned to the stable, may be valid as a police regulation, if authorized by the city charter, and in such case the removal of the cars from the street to the stable is not a taking of the company's property without due process of law. *South Covington etc. Ry. Co.* v. *Berry*, 161.

29. POWER TO REGULATE STREET RAILWAYS.—The granting of a charter to operate a street railway does not deprive a city of the power to make reasonable regulations for the enjoyment of such charter in such way as is consistent with the safety of the public. *South Covington etc. Ry. Co.* v. *Berry*, 161.

30. ULTRA VIRES—The action of the officers of a school district in borrowing and expending money in the improvement of school property without lawful authority raises no liability against the school district for money had and received, nor is it sufficient to create an estoppel against such district to deny its liability for the benefit received. No estoppe or ratification can be inferred from its retention or enjoyment of the benefit of the expenditure when it has had no option to reject the improvement. *Young* v. *Board of Education*, 340.

31. RESCINDING VOTE OF COMMON COUNCIL.—The legislative department of a municipal corporation may, at any time before the rights of third persons have vested, consistent with the law of its creation and its rules of action, rescind previous votes and orders. *McConoughey* v. *Jackson*, 53.

See ADULTERATION; CONTRACTS, 6; DEEDS, 6; INJUNCTION; JUDGMENTS, 10; STATUTES, 14.

MURDER.

See HOMICIDE.

NATIONAL BANKS.

See BANKS, 6.

NEGLIGENCE.

1. NEGLIGENCE IS the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what such a person would not have done under those circumstances. This definition does not exclude the idea that one may act upon appearances. *McDonald* v. *International etc. Ry. Co.*, 803.
2. PROXIMATE CAUSE—QUESTION OF LAW.—The question of proximate cause upon undisputed facts is for the court and not for the jury to determine. *Behling* v. *Southwest Penn. Pipe Lines*, 724.
3. PROXIMATE CAUSE is one which in actual sequence, undisturbed by any independent cause, produces the result complained of. *Behling* v. *Southwest Penn. Pipe Lines*, 724.
4. PROXIMATE CAUSE—BURSTING OF PIPE.—A pipe line company is not responsible for the loss of a house by fire occasioned by a flow of burning oil from adjoining property upon the pipe line, causing it to burst and throw the burning oil upon the house. In such case the burning oil, and not the pipe line, is the proximate cause of the loss. *Behling* v. *Southwest Penn. Pipe Lines*, 724.
5. PIPE LINE COMPANIES—CONSTRUCTION OF PIPE LINE.—The bursting of a pipe line, caused by a flow of burning oil over it from adjoining property, is not such element of danger as the pipe line company is bound to foresee and provide against for the protection of the property of third persons when constructing its line. *Behling* v. *Southwest Penn. Pipe Lines*, 724.
6. NEGLIGENCE—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT. A mother who performs her own household duties, and cares for her child twenty months old, but who has no paramount duty to perform which could excuse inattention to the child at the time when she permits it to come out of an open door in which she is standing, pass at her feet out to a street railway, without her knowledge, and there, in full view, place itself on the track, with an approaching car also in full view, is guilty of such contributory negligence that no recovery can be had by the parents for the loss of the child, if it is run over and killed by the passing car. *Johnson* v. *Reading etc. Ry.*, 752.
7. CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF DOES NOT PRECLUDE HIS RECOVERY WHEN the conduct of the defendant is wanton and willful, or where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness. *McDonald* v. *International etc. Ry. Co.*, 803.
8. CONTRIBUTORY AND GROSS.—SLIGHT CONTRIBUTORY NEGLIGENCE of a person who is injured defeats his right to recovery, though the defendant or his agents were guilty of gross negligence, provided the injury would not have been suffered except for the negligence of the plaintiff. This rule does not apply where the defendant or his servants discover the peril of the person subsequently injured, and do

not use reasonable precautions to avoid injuring him. *McDonald* v. *International etc Ry. Co.*, 803.

See DAMAGES; INSURANCE, 6; MASTER AND SERVANT, 2, 5–9; MUNICIPAL CORPORATIONS, 24; OFFICERS, 6–8; PARENT AND CHILD; RAILROADS, 7, 12, 13, 15, 16, 19, 21; TELEGRAPH COMPANIES, 2, 3.

NEGOTIABLE INSTRUMENTS.

1. RIGHTS OF HOLDERS.—Innocent holders of negotiable paper for value are not prejudiced by any equities existing between the antecedent parties, of which they had neither notice nor knowledge of such facts as should put them on inquiry. This rule does not apply to the authority to make the paper, and as to that they purchase at their peril. *Chemical Nat. Bank* v. *Wagner*, 206.
2. MORTGAGE NOTES—RIGHTS OF HOLDER.—One who as security for negotiable notes has executed a mortgage, which he had the full right and capacity to make, on property belonging to self, by an act suggesting on its face no defect, duly recorded and importing confession of judgment, in favor, not solely of the mortgagee, but of any future holder of the note, cannot impair its value and binding effect in the hands of a subsequent holder, by pleading secret equities created by his own fault, negligence, or imprudence, of which such holder has no notice and no means of information. *State Nat. Bank* v. *Flathers*, 216.
3. BONA FIDE HOLDER—NOTICE OF DEFENSES.—Notice of defenses which an indorsee of negotiable paper taken before maturity as collateral security for antecedent indebtedness must have, in order to prevent his enjoying the advantage of a *bona fide* purchaser, must be such as to charge him with fraud or actual bad faith. *Rosemond* v. *Graham*, 336.
4. BONA FIDE HOLDER OF COLLATERAL.—An indorsee of negotiable paper taken before maturity as collateral security for an antecedent indebtedness, in good faith, and without notice of defenses, such as fraud, which might have been available as between the original parties, holds the paper free from such defenses. *Rosemond* v. *Graham*, 336.
5. NOTICE TO HOLDER.—The consideration of negotiable paper in the hands of a *bona fide* holder for value, before maturity, cannot be inquired into. Actual notice of facts impeaching the validity of the note and its consideration must be brought home to him to avoid it in his hands. *Jennings* v. *Todd*, 373.
6. NEGOTIABLE PAPER OF CORPORATION—RIGHTS OF HOLDER.—A purchaser of negotiable paper issued by the agent of a corporation in its name buys at his peril as to the agent's authority, but if such agent in issuing the paper acts within the scope of his authority, though he acts wrongfully, of which the purchaser had no notice, nor notice of facts sufficient to put him on inquiry, he is protected as an innocent purchaser. *Chemical Nat. Bank* v. *Wagner*, 206.
7. COLLATERAL AGREEMENT—NOTICE OF INDORSER.—A collateral, contemporaneous agreement providing that a note shall not be paid if an executory contract forming the consideration for the note shall not be performed is not allowed to defeat the negotiability of the note in the hands of an indorsee, though he has notice of such agreement; but if the breach of such agreement has occurred to the knowledge of the indorsee at the time he becomes a purchaser he is not protected. *Jennings* v. *Todd*, 373.

8. COLLATERAL AGREEMENT—ESTOPPEL.—When a collateral, contemporaneous agreement provides that a note shall not be paid if an executory contract forming the consideration therefor shall not be performed, the fact that the maker states to the indorsee, at the time of the purchase of the note by the latter, that he "supposed he would as soon he would have it as anybody else," does not estop the maker from setting up the validity of the note if at the time of such statement there had been no breach of the executory contract, and he had no reason to suspect that one would occur. *Jennings* v. *Todd*, 373.

9. INDORSEMENT IN BLANK—LIABILITY OF INDORSER.—A third person who indorses his name upon a note in blank at the time it is executed and before delivery, is, as to a subsequent *bona fide* holder for value, liable thereon as a joint maker. *Salisbury* v. *First Nat. Bank*, 527.

10. PARTIES.—An indorsee of a note may maintain suit thereon in his own name alone against the maker, though others are beneficially interested in the paper. *Rosemond* v. *Graham*, 336.

11. NOTE WITH CURRENT RATE OF EXCHANGE.—A stipulation for the payment of the current rate of exchange on a place other than the place of payment, inserted in a note for a certain sum of money, does not render it non-negotiable. *Hastings* v. *Thompson*, 315.

See AGENCY, 3; CHECKS; CORPORATIONS, 23, 25, 27; SURETYSHIP, 2.

NEWSPAPERS.

See CERTIORARI, 4, 5; CONTEMPT, 2, 3; MUNICIPAL CORPORATIONS, 12, 13; STATUTES, 19.

NEW TRIAL.

1. CRIMINAL PRACTICE—INDORSEMENT OF NAME OF WITNESS ON INDICTMENT. An objection that a witness is not competent to testify for the reason that his name is not indorsed on the indictment cannot be raised for the first time on motion for a new trial. *State* v. *Johnson*, 405.

2. JURY TRIALS—IMPROPER CONDUCT OF OFFICER VITIATING VERDICT.—The fact that an officer of the court who has charge of the jury during its deliberation in a criminal case speaks reprovingly to a juror for not agreeing to a verdict which such officer conceives should be returned, and states to the juror that the case is plain, constitutes such misconduct as vitiates the verdict, and entitles the defendant to a new trial. *State* v. *Langford*, 277.

See BURGLARY, 5.

NONUSER.

See CORPORATIONS, 37.

NOTARIES PUBLIC.

1. A NOTARY PUBLIC IS AUTHORIZED TO PUNISH A WITNESS FOR CONTEMPT if the statute relating to depositions authorizes them to be taken before notaries public, and declares that the refusal to answer as a witness, when lawfully ordered, may be punished as a contempt by the court or officer by whom the attendance or testimony of the witness is required. *De Camp* v. *Archibald*, 692.

2. CONSTITUTIONAL LAW.—A NOTARY PUBLIC MAY BE AUTHORIZED TO PUNISH A WITNESS FOR CONTEMPT in refusing to answer a material question on the taking of a deposition. The statute purporting to

confer such authority is not in conflict with a constitution vesting all the judicial power of the state in certain courts. *De Camp* v. *Archibald*, 692.

See CONTEMPT, 1; ESTOPPEL, 2.

NOTICE.

1. FACTS PUTTING ON INQUIRY.—Generally, one is charged with notice of a fact who has information putting him on inquiry, if by following up such information with diligence and understanding the truth could have been ascertained. *Jennings* v. *Todd*, 373.
2. DUTY TO INQUIRE.—Whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of every thing to which that inquiry would presumably have led. *Mercantile Nat. Bank* v. *Parsons*, 299.

See CORPORATIONS, 19; INSURANCE, 1, 2; LIS PENDENS, 1; MUNICIPAL CORPORATIONS, 22; NEGOTIABLE INSTRUMENTS, 6, 7; TELEGRAPH COMPANIES, 1; TRUSTS.

NUISANCE.

BLASTING WITH GUNPOWDER in a city or town near enough to the property of others to do injury is a nuisance, unless proper precautions are taken to prevent injury to such property, or to the persons of others ignorantly coming within its reach. *James* v. *McMinimy*, 200.

See MUNICIPAL CORPORATIONS, 12, 13.

OFFICERS.

1. ASSIGNMENT OF UNEARNED SALARY.—A contract for the sale and collection of the future salary of his office by a public officer is contrary to public policy and void. *State* v. *Williamson*, 358.
2. ASSIGNMENT OF UNEARNED SALARY — EMBEZZLEMENT.—A contract of sale by a public officer of his unearned salary by which he agrees to act as the agent for the purchaser in its collection when due is void. If he afterwards collects such salary and converts it to his own use he does not commit embezzlement. *State* v. *Williamson*, 358.
3. IMPEACHMENT OF OFFICERS — CONSTITUTIONAL LAW — DELEGATION OF POWER. When the constitution has conferred the power of impeachment solely upon the state legislature in joint convention the latter cannot delegate such power to managers of impeachment appointed by it, nor can such managers change or amend in any material matter the specifications in the articles of impeachment adopted and presented by the legislature. *State* v. *Leese*, 474.
4. IMPEACHMENT OF OFFICERS—JURISDICTION.—After the expiration of his term of office the state legislature has no power to prefer, nor has the supreme court any power to try, articles of impeachment against a state officer. *State* v. *Leese*, 474.
5. MISDEMEANORS IN OFFICE.—A public officer, after the expiration of his term, may be prosecuted and punished for a misdemeanor committed while in office. *Commonwealth* v. *Coyle*, 708.
6. CRIMINAL LIABILITY FOR NEGLECT.—DIRECTORS OR OVERSEERS OF THE POOR are criminally liable at common law for willful neglect or refusal to discharge their official duties to paupers under their charge. *Commonwealth* v. *Coyle*, 708.
7. CRIMINAL LIABILITY FOR NEGLECT.—The neglect or failure of a public officer to perform any duty which by law he is required to perform is

an indictable offense, even though no damage is caused by the default, and a mistake as to his powers, or with relation to the facts of the case, is no protection. *Commonwealth* v. *Coyle*, 708.

3. CRIMINAL LIABILITY FOR NEGLECT.—Directors or overseers of the poor, who knowingly bind a pauper under their charge to service with a cruel master, and continue him in such service when they know, or ought to know, that his health is seriously impaired and his life endangered thereby, are guilty of such breach of duty as constitutes a misdemeanor in office, and subjects them to criminal liability, without proof of notice to them of each specific act of cruelty contributing to the distress of their victim. *Commonwealth* v. *Coyle*, 708.

See ACKNOWLEDGMENTS, 1; ASSIGNMENT; CORPORATIONS, 18, 25–28; NEW TRIAL, 2.

ORDINANCES.

See ADULTERATION; MUNICIPAL CORPORATIONS, 7, 8, 10, 12, 14–18, 27, 29; TRIAL, 1.

PARDON.

See ACCESSARIES, 2.

PARENT AND CHILD.

NEGLIGENCE—DUTY OF PARENT TO PROTECT CHILD.—It is the duty of a parent to shield his young child from danger, and if, by his own carelessness and neglect of the duty of protection, he contributes to his loss of his child's services, he is *in pari delicto* with a negligent defendant, and cannot recover for an injury to the child. Whether the parent is negligent depends on whether, under the circumstances, he takes reasonable care of his child. *Johnson* v. *Reading etc. Ry.*, 752.

See ADVANCEMENTS; NEGLIGENCE, 6.

PARKS.

See MUNICIPAL CORPORATIONS, 23.

PARTIES.

See NEGOTIABLE INSTRUMENTS, 10.

PARTITION.

See COTENANCY; PARTNERSHIP, 1.

PARTNERSHIP.

1. PARTNERSHIP IN LAND—PAROL PARTITION.—A division of partnership land is void unless evidenced by writing, and if either or both of the partners have taken possession of the land under a verbal agreement for its division, either may repudiate the agreement, and reclaim possession of the land. *Duncan* v. *Duncan*, 159.

2. PARTNERSHIP LAND IS CONSIDERED AS PERSONALTY only for the purpose of partnership assets with which to pay firm debts, but though sold by the firm for that purpose, the sale is void unless evidenced by writing. *Duncan* v. *Duncan*, 159.

3. AT THE DISSOLUTION OF A PARTNERSHIP EACH OF ITS MEMBERS has an equal right to the possession of its assets, and is under an equal duty to apply them to the discharge of its obligations. *Gray* v. *Gray*, 506.

4. A SURVIVING PARTNER MUST COMPLETE ALL EXECUTORY CONTRACTS of the firm remaining in force after the death of a partner, and settle all partnership business without charge against the partnership for his personal services. *Little* v. *Caldwell*, 89.

5. ATTORNEYS AT LAW.—A SURVIVING PARTNER OF A FIRM OF ATTORNEYS at law is bound to complete all business undertaken or agreed to be done by the firm in the lifetime of the deceased partner, and without charge to the partnership for the services rendered in so doing. *Little* v. *Caldwell*, 89.

6. ATTORNEYS AT LAW.—AFTER THE DEATH OF A MEMBER OF A FIRM OF ATTORNEYS all unfinished business intrusted to the firm, and which the client permits the survivor to complete, constitutes an equitable asset for the proceeds of which he must account to the representatives of the deceased partner. *Little* v. *Caldwell*, 89.

7. ATTORNEYS AT LAW.—A SURVIVING PARTNER OF A FIRM OF ATTORNEYS at law occupies the position of trustee, and cannot be permitted to make gain for himself at the expense of the estate of the deceased partner by consenting to the extinction of a contract belonging to the partnership and the substitution of another therefor relating to the same subject matter, and in the profits of which he alone is to participate. *Little* v. *Caldwell*, 89.

8. ATTORNEYS AT LAW.—IF, AT THE DEATH OF A MEMBER OF A FIRM OF ATTORNEYS AT LAW, A NEW CONTRACT is entered into between the survivor and the client with respect to business intrusted to the partnership by which the survivor is to make advances and render services not contemplated in the original contract, and to receive additional compensation, he is obliged as between himself and the estate of the deceased partner, to render without compensation all the services required by the original contract, and to account for the deceased partner's share of the profits thereof, but may retain for himself the additional sum to which he becomes entitled by the terms of the new contract made after his partner's death. No principle of equity is violated by his retention of the additional compensation arising out of the new contract, so long as the partnership is awarded all that could accrue to it under the old contract. *Little* v. *Caldwell*, 89.

9. A CAUSE OF ACTION AGAINST A LIQUIDATING PARTNER for an accounting does not arise at the moment of the dissolution, nor, on the other hand, is it necessarily postponed to the complete and final ending of the partnership business. Such cause of action accrues after the liquidating partner, under the circumstances of the particular case, has had a reasonable time within which to perform his duty, when it ought to be fully completed, and when he is in fault if it is not. *Gilmore* v. *Ham*, 554.

10. A LIQUIDATING PARTNER after the dissolution of a partnership becomes its sole agent for the purpose of winding up its affairs, but no new authority is given him. He is merely the agent of the partnership for the one specific purpose, and must perform his duty with reasonable dili-

genee, and, while he so performs it, no cause of action in favor of the retiring partner can arise. *Gilmore* v. *Ham*, 554.

See ATTORNEY AND CLIENT, 1; CORPORATIONS, 8; HOMESTEAD, 2; LIMITATIONS OF ACTIONS, 3, 4.

PATENTS.

See PUBLIC LANDS.

PAUPERS.

See OFFICERS, 6, 8.

PAYMENT.

See BANKS, 5; CHECKS; ESTOPPEL, 1.

PENALTY.

See COURTS.

PENSIONS.

See ATTACHMENT, 7.

PERSONAL PROPERTY.

See PARTNERSHIP, 2; TAXES, 1.

PIPE-LINE COMPANIES.

See NEGLIGENCE, 4, 5.

PLEADING.

1. AN AVERMENT ON INFORMATION AND BELIEF that an applicant for a writ of mandate to compel the issuing to him of a warrant upon a claim allowed him for expenses incurred in procuring legal services to be rendered for the city that he is a city officer and "interested both directly and indirectly in the pretended contract upon which is based the pretended claim referred to in the complaint herein," without a statement of any facts upon which the conclusion is based or the nature of the contract referred to, cannot rise to the dignity of a defense. *McConoughey* v. *Jackson*, 53.

2. MANDAMUS.—A DENIAL in response to an application for a writ of mandate to compel the issuing of a warrant in payment of an allowed claim that any indebtedness existed in favor of the applicant is a denial of a conclusion of law, and, therefore, is insufficient to tender an issue. *McConoughey* v. *Jackson*, 53.

3. A DENIAL UPON INFORMATION AND BELIEF OF FACTS PECULIARLY WITHIN THE KNOWLEDGE of the defendant is unavailing. Therefore, if it is the duty of the defendant, in his official capacity, to know whether or not an allegation is true, he will not be permitted to put it in issue by a denial under information and belief. *McConoughey* v. *Jackson*, 53.

4. A DENIAL of the execution of a deed puts in issue the delivery thereof, though the allegation to which such denial was addressed was that the defendants did "execute under their hands and seals and deliver" such deed. *Le Mesnager* v. *Hamilton*, 81.

See INSURANCE, 14.

PLEDGE.
See CORPORATIONS, 6.

POSSESSION.
See BURGLARY, 2; ESTATES, 1.

POWER OF ATTORNEY.
See AGENCY, 4

POWERS.
1. A POWER OF SALE GIVEN IN A WILL IS SUBJECT TO THE RULE OF CONSTRUCTION applicable to the other parts of the will, to wit, that the intention of the testator is to be ascertained and carried out so far as possible. *Cotton* v. *Burkeiman*, 584.
2. WILLS—POWER OF SALE, WHEN CONTINUES.—If a testator gives his whole property to his wife for life, prescribing that it shall be in lieu of dower, and that the remainder in fee shall go to his daughter, and charging upon such property the support of his mother, and investing his wife "with full power to sell and dispose of all or any part of my real estate or personal securities of which I might die possessed as in her judgment may seem best for the benefit of our daughter," such power of sale does not terminate on the death of the daughter, but continues in the widow, because the primary object of the power was to benefit her as life tenant, and to enable her to secure by a sale and the investment of the proceeds a larger and more reliable income than the land itself would yield. *Cotton* v. *Burkeiman*, 584.

PREFERENCES.
See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

PREMIUM.
See INSURANCE, 6, 9–12.

PRESENTMENT.
See BANKS, 4; CHECKS, 1–5.

PRESUMPTION.
See ADVANCEMENTS; BANKS, 1; EVIDENCE, 5; EXECUTION, 2; JUDICIAL SALES; STATUTES, 3, 7.

PRINCIPAL AND AGENT.
See AGENCY.

PRINCIPAL AND SURETY.
See SURETYSHIP.

PRIORITY.
See MORTGAGES, 1.

PRIVILEGE.
See CONTEMPT, 1.

PROBATE COURT.
See JURISDICTION, 1.

PROCESS.
See JUDGMENTS, 1, 2, 4; SHERIFFS.

PROHIBITION.
See CONTEMPT, 3.

PROMISSORY NOTES.
See AGENCY, 4.

PROMOTERS.
See CORPORATIONS, 30–35.

PROOFS OF LAWS.
See INSURANCE, 3.

PROSECUTING ATTORNEY.
See APPEAL, 6.

PROXIMATE CAUSE.
See NEGLIGENCE, 2–4.

PUBLIC LANDS.

1. ERRONEOUS SURVEY — RIGHTS OF PATENTEE.—The government cannot correct a survey so as to defeat or injuriously affect the rights of its patentees by any *ex parte* acts, or in any way, except by a proceeding to which such patentees are parties, and in which they have an opportunity to be heard. The United States has no more right to limit or diminish the effect of its past grants by its own acts than has a private grantor. *Lamprey* v. *Mead*, 328.
2. RIGHTS OF PATENTEE — ERRONEOUS SURVEY — MEANDER LINES. — A United States patent to land issued under a plat of a government survey, from which it appears to be bounded on one side by a meandered non-navigable lake, cannot be attacked by a third party as void in so far as it purports to convey the land under the water, although the survey is erroneous in treating the tract covered by water as a lake to be meandered, instead of land to be surveyed. Such patent can be avoided only at the instance of the United States, in proper proceedings for its reformation, to which the patentee must be made a party. *Lamprey* v. *Mead*, 328.

RAILROADS.

1. LIABILITY FOR DEFECTIVE TRACK.—A railway is not an insurer against all accidents, but when an injury results from a defect in the track that, by the exercise of proper care, could have been provided against by the company, it is liable. *Ohio etc. Ry Co.* v. *Watson*, 211.
2. EVIDENCE OF CONDITION OF TRACK. — When, in an action against a railway company to recover for injury to a passenger by the derailment of a car alleged to have resulted from rotten ties at the place of the accident, the evidence is conflicting as to the condition of the

track at that place, proof on the part of the plaintiff as to the defective condition of the track on account of rotten ties near to, as well as at, the place of the accident, is admissible, especially when the defendant has first made that an issue by introducing evidence. *Ohio etc. Ry Co.* v. *Watson*, 211.

3. DEFECTIVE TRACK.—Evidence of the defective condition of railroad ties within a reasonable time before and after an accident on the track is competent as tending to show their condition at the time of the accident. The limitation to such evidence is that it must be such in character and point of time as to justify the inference that the ties were in bad condition when the accident occurred. *Swadley* v. *Missouri Pac. Ry. Co.*, 366.

4. RISKS ASSUMED BY PASSENGER ON FREIGHT TRAIN.—One who takes passage on a freight train assumes the additional risks, if any, in excess of the risks incident to a passage on the same road on a passenger train. *Ohio etc. Ry. Co.* v. *Watson*, 211.

5. RISKS ASSUMED BY PASSENGER ON FREIGHT TRAIN are no greater than those assumed by a passenger on a regular passenger train, so far as the condition of the cross-ties or of the condition of the road for the safety of trains moving upon it is involved. *Ohio etc. Ry. Co.* v. *Watson*, 211.

6. DEGREE OF CARE DUE TO FREIGHT PASSENGER.—The highest degree of care and diligence is required of a railway company for the safety of passengers on freight as well as passenger trains. *Ohio etc. Ry. Co.* v. *Watson*, 211.

7. SPEED OF TRAINS.—The law does not impose any rule as to the rate of speed of passenger trains. Hence the fact that in passing a small station such train was run at a high rate of speed cannot be regarded as negligence *per se*. On the other hand, it is always proper to submit to the jury the question, whether, under the circumstances of a particular case, the running of a train at a high rate of speed was or was not negligent. *McDonald* v. *International etc. Ry. Co.*, 803.

8. ACCIDENTS—FAILURE TO RING THE BELL.—Where the servants in charge of a train fail to ring the bell or blow the whistle, and such failure could not have been the cause of the accident, it is proper to so instruct the jury, and to tell them that the railway corporation cannot, because of such failure, be held answerable for the accident. *McDonald* v. *International etc. Ry. Co.*, 803.

9. MASTER AND SERVANT—FELLOW-SERVANTS.—A railroad track repairer and the employees in charge of regular freight and passenger trains belonging to the same master are not fellow-servants. *Swadley* v. *Missouri Pac. Ry. Co.*, 366.

10. MASTER AND SERVANT.—A CONDUCTOR AND BRAKEMAN on the same train are fellow-servants. *Campbell* v. *Cook*, 878.

11. TRAIN-DISPATCHERS, LIABILITY FOR.—A train-dispatcher in the dispatch of trains performs for the master a duty which he owes as such, and the master is therefore answerable to a fireman injured by the collision of two trains in consequence of their obedience to orders negligently promulgated by such dispatcher. Such fireman and the train-dispatcher are not fellow-servants. *Hankins* v. *New York etc. R. R. Co.*, 616.

12. MASTER AND SERVANT. — IF A TRAIN-DISPATCHER originates and promulgates orders for the running of trains without regard to their ordinary time-tables, and when each is approaching the other in entire

ignorance of the other's whereabouts, he is acting as a master, and therefore the master is liable for the negligence of the dispatcher. *Hankins* v. *New York etc. R. R. Co.*, 616.

13. NEGLIGENCE TOWARDS SERVANT.—When a railroad car jumps the track and injures a track-repairer while standing on the side of the track under orders from his foreman, the company is liable if the accident is caused by a negligently defective track, or by reason of the fact that the train is not run in an ordinarily safe and prudent manner, and knowledge by such track-repairer of the defective condition of the track, while a circumstance tending to show contributory negligence in not getting further away from the track as the train passed, does not of itself, and as matter of law, defeat his right to recover. *Swadley* v. *Missouri Pac. Ry. Co.*, 366.

14. MASTER AND SERVANT—EMPLOYER AS TRESPASSER.—A railroad track-repairer, walking on the company's right of way with other employees, after the usual working hours, for the purpose of taking a train to the next working place, is not a trespasser. *Swadley* v. *Missouri Pac. Ry. Co.*, 366.

15. CONTRIBUTORY NEGLIGENCE OF EMPLOYEE—DEFECTIVE APPLIANCES.—Mere knowledge of a railroad employee that an appliance owned by the company is defective, and that risk is incurred in its use, does not, as matter of law, defeat the employee's action when the danger is not such as to threaten immediate injury, or when it is reasonable to suppose that the appliance may be safely used by the exercise of care and caution. *Swadley* v. *Missouri Pac. Ry. Co.*, 366.

16. STREET RAILROADS—NEGLIGENCE—WRONGFUL EXPULSION OF PASSENGER.—Though a street-car conductor in ejecting a passenger from a car may have done only what was apparently his duty, it does not follow that the company is not liable, if by its previous neglect of duty towards such passenger it has justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the company, should expel him for nonpayment of fare. *Appleby* v. *St. Paul etc. Ry. Co.*, 308.

17. STREET RAILROADS—WRONGFUL EXPULSION OF PASSENGER.—A passenger on a street-car who has paid his fare and received a transfer entitling him to continue his journey by the next connecting car on another line of the same company, and who, after he has taken the connecting car and surrendered his transfer, is prevented from completing his journey by reason of the car being taken off the line, is justified in taking the next passenger car, when, in the absence of the conductor, he is informed by the driver of the car he has taken off that this is the proper course to pursue, and if such passenger is ejected by the conductor of the last car for want of a transfer and refusal to pay fare, he has a *prima facie* right against the company to recover for such expulsion. *Appleby* v. *St. Paul etc. Ry. Co.*, 308.

18. STREET RAILROADS—DUTY TO PASSENGERS.—It is the duty of a street-car company to give to its passengers such instructions or directions, as to its own system or course of conduct, as may be reasonably necessary to enable them to pursue their journey, and it is liable in damages for a failure to perform this duty resulting in injury to a passenger. *Appleby* v. *St. Paul etc. Ry. Co.*, 308.

19. STREET RAILWAYS—NEGLIGENCE.—DUTY OF DRIVER OF STREET-CAR is to drive with care, to be on the lookout for obstructions, whether persons

or vehicles, on the track, but he may, in the performance of his duty, ascertain from a person on the side of the street, by looking at him, whether he desires to take passage, and in doing so it does not necessarily follow that he is guilty of negligence. *Johnson* v. *Reading etc. Ry.*, 752.

20. STREET RAILWAYS—NEGLIGENCE—WHEN QUESTION FOR JURY.—When, in an action to recover for injuries to a child run over by a street-car, the evidence is conflicting as to the length of time the child was on the track, and whether the driver of the car could have seen it, had he been looking at the track, in time to stop before reaching the child, the question of negligence is for the jury to determine. *Johnson* v. *Reading etc. Ry.*, 752.

21. STREET RAILWAYS—NEGLIGENCE TOWARD CHILD.—The mere fact that a young child is on a railroad track, where it has no right to be, does not relieve a street railway company from liability for its own negligence in injuring the child. *Johnson* v. *Reading etc. Ry.*, 752.

See ATTACHMENT, 2; CARRIERS; CORPORATIONS, 21, 32, 35; NEGLIGENCE, 6; STATUTES, 9, 20, 21.

RAPE.

1. EVIDENCE — RES GESTÆ — CORROBORATION. — A witness to whom complaint has been made by the victim of a rape, or an attempt to rape, is not, at the trial, permitted to repeat, on direct examination, all the details of the outrage, and the name of the ravisher, as subsequently reported to such witness, but can only testify to the fact that the complaint was made, and as to the condition of the victim when making the complaint. When such statements are part of the *res gestæ* they are admissible, or may be drawn out by defendant on cross-examination; and they may also be admitted to corroborate the testimony of the prosecutrix, but only when her testimony has been impeached. *State* v. *Langford*, 277.

2. SUFFICIENCY OF INDICTMENT.—An information for assault with intent to commit rape, charging that defendant, with force and arms, unlawfully did make an assault upon the prosecutrix, with intent her, the said prosecutrix, then violently and against her will feloniously to ravish and carnally know, is sufficient, although it fails to allege that the assault was made "feloniously," "forcibly," or "violently." *State* v. *Langford*, 277.

RATIFICATION.

See COVENANCY, 2; MUNICIPAL CORPORATIONS, 30.

RECEIVERS.

See STATUTES, 9

RECOGNIZANCE.

See BAIL.

RECORD.

See TRIAL, 7.

RE-ENACTMENT

See STATUTES, 7.

REGULATIONS.
See TELEGRAPH COMPANIES, 1, 3, 4.

REFORMATION.
See EQUITY, 6; PUBLIC LANDS, 2.

REMAINDERS.
See ESTATES; WILLS, 4.

REPEAL.
See MARRIAGE AND DIVORCE, 3.

REQUISITION.
See EXTRADITION, 2–4.

RESCISSION.
See MUNICIPAL CORPORATIONS, 31, TRIAL, 8.

RES GESTÆ.
See EVIDENCE, 8–10; RAPE, 1.

RES JUDICATA.
See JUDGMENTS, 8.

RESPONDEAT SUPERIOR.
See MASTER AND SERVANT, 8.

RESTRAINT OF TRADE.
See CONTRACTS, 9–12.

REVOCATION.
See WILLS, 2.

RIPARIAN RIGHTS.
See WATERS.

ROYALTIES.
See DEVISE.

SALARY.
See ASSIGNMENT; OFFICERS, 1, 2.

SALES.
See EXECUTION, 2–5; VENDOR AND PURCHASER.

SALVAGE.
See ADMIRALTY, 1–3.

SEALS.
COURTS.—A WRIT ISSUED FROM A COURT HAVING A SEAL is void unless attested thereby. *Choate* v. *Spencer*, 425.
See CONTRACTS, 2; JUDGMENTS, 2; STATUTES, 15.

SCHOOLS.

See JURISDICTION, 1; MUNICIPAL CORPORATIONS, 22.

SEDUCTION.

1. COMPETENCY OF DEFENDANT AS WITNESS.—When, on a trial for seduction, the defendant testifies only to immaterial matter, the failure of the court to instruct as to his competency, and the weight to be given to his testimony, is not error. *State* v. *Brandenburg*, 362.
2. INTENT TO MARRY.—In a prosecution for seduction under promise of marriage, the fact that the defendant intended to marry the prosecutrix is immaterial. *State* v. *Brandenburg*, 362.

See APPEAL, 6; BIGAMY, 1.

SELF-DEFENSE.

See HOMICIDE, 6.

SERVICES.

See ADVANCEMENTS, 2.

SETOFF.

See BANKS, 3.

SHERIFF'S DEEDS.

See EXECUTION, 2, 4, 5.

SHERIFF'S RETURN.

See EVIDENCE, 6.

SHERIFFS.

1. PROCESS—RETURN—ALTERATION.—It is not competent for a sheriff to alter or amend a return of process which has been made. If the writ bears his return, and has been delivered to the prothonotary, the sheriff's control over it is ended, and any alteration by him without leave of court is unauthorized and void. *Deacle* v. *Deacle*, 719.
2. PROCESS — RETURN — ALTERATION — PRACTICE. — The question whether there has been an alteration by the sheriff of a return made, or only a refusal by him to accept a return prepared by his deputy, but not actually made, and the substitution by him of a new one in place of it while the writ is still in his hands, is a question for the court, before which the case is heard, to decide. *Deacle* v. *Deacle*, 719.

SHIPPING.

1. GENERAL AVERAGE—RULE OF, WHEN APPLIES.—The rule of general average applies only when there is common danger to the vessel and to the cargo; and then every thing which is saved by one continued unremitted effort must pay the expense in proportion to its value. This rule does not apply when the expenses involved are not incurred for the common benefit of the vessel and cargo, as where the cargo is taken off to lighten the vessel, and not because the cargo is in danger. Expenses incurred for a separate interest, and not for the common benefit of vessel and cargo, are chargeable to that interest only. *Louisville Underwriters* v. *Pence*, 176.

2. FREIGHT IS NOT EARNED EXCEPT BY THE PERFORMANCE of the voyage and the delivery of the cargo to the place of destination, unless the contract provides for the payment of freight *pro rata itineris*. Therefore, in the absence of such contract, there can, in the event of the wrecking of the vessel before completing the voyage, be no valid claim for freight earned. *China etc. Ins. Co.* v. *Force*, 576.

See ADMIRALTY; CONFLICT OF LAWS, 2.

SOLICITATION.

See CRIMINAL LAW.

STATES.

See CONFLICT OF LAWS, EVIDENCE, 4; EXTRADITION; INSURANCE, 16–19; MUNICIPAL CORPORATIONS, 4.

STATE'S EVIDENCE.

See ACCESSARIES.

STATUTES.

1. PROOF OF ENACTMENT OF.—Whenever a question arises in a court of law as to the existence of a statute, or of the time when it took effect, or of its precise terms, the judge who is called upon to decide it has a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question. *Hollingsworth* v. *Thompson*, 220.

2. ENACTMENT—PROOF OF.—Although an enrolled bill is not conclusive proof of the valid enactment of a statute, yet the court may look beyond it to the legislative journals, and they may supply, by presumption, every thing necessary to its validity, except when the legislative journal affirmatively shows a violation of the constitution. *Hollingsworth* v. *Thompson*, 220.

3. ENACTMENT — PRESUMPTIONS. — From considerations of public policy, and because of the respect due the action of a co-ordinate department of the government, courts supply the omissions of journal clerks by presumptions as to the regularity of the proceedings of the state legislature. *Hollingsworth* v. *Thompson*, 220.

4. ENACTMENT—PRESUMPTION.—When the constitution does not require the legislative journals to affirmatively show that a particular thing, necessary to the validity of the legislative action, was done, mere silence does not invalidate. In such case it is presumed that the legislature observed their obligation and did not pass the bill without sufficient proof that proper notice was given. *Hollingsworth* v. *Thompson*, 220.

5. ENACTMENT — VALIDITY — BURDEN OF PROOF.—The unconstitutionality of an act enrolled, authenticated by the signature of the presiding officers of the legislature, and approved and signed by the governor, must be affirmatively and clearly shown before the court is authorised to treat it as void, on the ground that it was passed in accordance with the rules of parliamentary law prescribed by the constitution. *Hollingsworth* v. *Thompson*, 220.

6. CONSTITUTIONAL LAW.—IF THE TITLE OF AN ACT DECLARES THAT IT IS "An act to define who are fellow-servants and who are not fellow-serv-

ants," such title does not contain two subjects. *Campbell* v. *Cook*, 878.

7. STATUTORY CONSTRUCTION.—IF A STATUTE IS RE-ENACTED after it has been construed by the courts the presumption is that the legislature intended that the new enactment should receive the same construction as the old. *Cargill* v. *Kountze*, 863.

8. WAIVER OF STATUTORY RIGHT OF PROTECTION.—Where the object of a statute is to promote great public interests, liberty, or morals, it cannot be defeated by a stipulation made by one of the class of persons entitled to its protection. *Griffith* v. *New York etc. Ins. Co.*, 96.

9. STATUTORY CONSTRUCTION CANNOT AUTHORIZE THE EXTENSION OF THE STATUTE to a case clearly not within its provisions. Therefore, a statute declaring that certain persons in the employ of railway corporations shall be deemed vice-principals and certain other persons fellow-servants is not applicable to persons employed by a receiver of such a corporation. *Campbell* v. *Cook*, 878.

10. CONSTITUTIONAL LAW—RETROSPECTIVE STATUTES—A STATUTE CREATING A CAUSE OF ACTION in favor of persons who have voluntarily paid taxes on property not subject to taxation, and requiring the county commissioners to repay the amount of such taxes out of any unexpended funds belonging to the county or in the treasury thereof, is retrospective and invalid. *Commissioners* v. *Roesche*, 653.

11. A STATUTE IS RETROACTIVE if it creates a new right, rather than afford a new remedy to enforce an existing right. *Commissioners* v. *Roesche*, 653.

12. A RETROSPECTIVE OR RETROACTIVE LAW IS one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new remedy, or attaches a new disability in respect to transactions or considerations already passed. *Commissioners* v. *Roesche*, 653.

13. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—A statute authorizing persons in any county containing a city of the first grade of the first class to maintain actions against such county to recover moneys voluntarily, but erroneously, paid on property not subject to taxation, for the recovery thereof, is special legislation upon a subject which ought to be uniform throughout the state, and contravenes section 26 of article 2 of the constitution of Ohio requiring general laws to have a uniform operation. *Commissioners* v. *Roesche*, 653.

14. MUNICIPAL CORPORATIONS — WATER WORKS — LEGISLATIVE CONTROL OVER.—A statute creating a board of water commissioners for a city and turning over to such board the water works and appliances already existing, and authorizing the board to take measures to plan and construct further works, and to charge the city for water furnished for the extinguishment of fires, and to fix and collect rates for water furnished private persons, is not unconstitutional as depriving the municipality of water rights, nor as devoting its property to purposes and objects other than those for which it was acquired. *Coyle* v. *McIntire*, 109.

15. CONSTITUTIONAL LAW.—A DEED DEFECTIVE because not executed under the corporate seal of a municipality may, by subsequent legislation, be given the same effect as if such seal had been regularly affixed thereto. *Gordon* v. *San Diego*, 73.

16. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or

the power of assessment for local improvements, or none of these, and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law. *Wulzen* v. *Board of Supervisors*, 17.

17. CONSTITUTIONAL LAW.—DUE PROCESS OF LAW, OR DUE COURSE OF LAW, OR LAW OF THE LAND is such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Wulzen* v. *Board of Supervisors*, 17.

18. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—ADMINISTRATIVE PROCESS OF THE CUSTOMARY SORT is as much due process of law as judicial process, and when it is claimed that in a proceeding authorized by statute, parties in interest are not afforded due process of law, the claim should be denied, if, upon examination of the previous condition of things in use and regarded essential to the protection of the rights of the individual under such circumstances, it is found that the course prescribed by the statute assailed is in substantial compliance with such essentials. *Wulzen* v. *Board of Supervisors*, 17.

19. CONSTITUTIONAL LAW.—POWER TO SUPPRESS NEWSPAPERS or to prohibit their publication is not within the compass of legislative action by a state; and any law enacted for that purpose is clearly in derogation of the constitutional liberty of the press. *Ex parte Neill*, 776.

20. CONSTITUTIONAL LAW.—A STATUTE DEFINING WHAT EMPLOYEES OF RAILROAD COMPANIES shall be deemed vice-principals and what fellow-servants does not deny to such corporations the equal protection of the law, and is not unconstitutional. *Campbell* v. *Cook*, 878.

21. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS.—A statute respecting railway corporations, defining what employees shall be deemed vice-principals and what fellow-servants, does not, because it is applicable only to railway corporations, deny them the equal protection of the laws if all persons brought within its influence are treated alike under the same circumstances. *Campbell* v. *Cook*, 878.

See APPEAL, 7; BANKS, 6; CONTRACTS, 8; CORPORATIONS, 34, 35; INSANE PERSONS, 1; INSURANCE, 11, 17, 18; LARCENY, 3; LEGISLATURE; LIS PENDENS, 3; MARRIAGE AND DIVORCE, 1, 3; MUNICIPAL CORPORATIONS, 19; NOTARIES PUBLIC, 2; TRIAL, 5, 6.

STATUTE OF FRAUDS.

See CONTRACTS, 3.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STOCK.

See CORPORATIONS, 4–11; 20, 22; ESTATES, 4–6.

STOCKHOLDERS.

See CORPORATIONS, 12–19; MANDAMUS, 4, 5.

STREET RAILWAYS.

See MUNICIPAL CORPORATIONS, 27–29; RAILROADS, 16–21.

STREETS.

See CERTIORARI, 3; LEGISLATURE, 3; MUNICIPAL CORPORATIONS, 19-22, 24.

SUBROGATION.

1. RIGHTS OF SURETY.—Before a surety can claim the right to be subrogated to the rights of the creditor he must pay or discharge the debt in money, or in property taken as money. *Nettleton* v. *Ramsey County Land etc. Co.*, 342.
2. PURCHASER OF MORTGAGED PREMISES—PAYMENT BY SURETY ON NOTES. When a purchaser of mortgaged premises has expressly assumed the payment of the mortgage debt as part of the consideration, an indorser who has become liable on the mortgage notes is entitled, upon payment thereof, to subrogation to the rights and remedies of the payee of such notes, and may recover of such purchaser the amount thereof. Such right of subrogation extends not merely to the mortgage security, but also to the debt and remedies to enforce it. *Nettleton* v. *Ramsey County Land etc. Co.*, 342.
3. SURETY IN CLAIMANT'S BOND.—When goods held under a fraudulent trust for a debtor are levied on by his creditors as his property, and released from execution under a claimant's bond given by the fraudulent trustee, the fact that the latter is held liable on the bond does not give him nor his surety any right to the goods by way of subrogation for indemnity as against other creditors of the fraudulent debtor who have intervened and acquired the right to look to the property for the satisfaction of their claims. *Rothschild* v. *Kohn*, 184.

SUPERVISORS.

See CERTIORARI, 3; CONSTITUTIONS, 3.

SURETYSHIP.

1. OFFICIAL BOND.—AN ADMINISTRATOR'S BOND purporting to be the joint obligation of the principal and the sureties, and the several obligation of the latter, and which the principal does not sign, though letters of administration are issued to him thereon, under which he receives and misappropriates the estate of the decedent, is absolutely void against the sureties, who, therefore, cannot be held answerable for his default. *Weir* v. *Mead*, 46.
2. RIGHT OF SURETY UPON PAYMENT OF PART OF DEBT.—When there is an agreement to pay an entire debt evidenced by notes maturing at different times, a surety who pays one of the notes is entitled to maintain an action against the principal debtor for the installment so paid, without waiting until the whole indebtedness is paid. *Nettleton* v. *Ramsey County Land etc. Co.*, 342.
3. SURETYSHIP—INDEPENDENT CONTRACT AS AFFECTING.—The liability of a purchaser of mortgaged premises, who, by the deed conveying the property, expressly assumes the payment of the mortgage debt, is not qualified or limited by an independent agreement between him and his grantor, by which the latter promises to pay certain installments of the mortgage debt as it falls due. Such agreement is for the sole benefit of the purchaser, and is in the nature of indemnity to him. *Nettleton* v. *Ramsey County Land etc. Co.*, 342.
4. BOND NOT SIGNED BY PRINCIPAL.—A BOND OF INDEMNITY purporting to be the bond of the plaintiff in the action, as principal, and two other

persons as sureties, stipulating that the parties would save the constable harmless from a claim made to property levied upon by him, though not signed by such principal, is binding upon the sureties. Though the sureties sign on the condition and understanding that the principal would also sign, and never intended or consented that the bond should be delivered without his signature, they lost no substantial rights by his failure to sign with them, and if they did not make known to the officer accepting the bond the condition or understanding upon which they signed it he cannot be prejudiced thereby. *Woodman* v. *Calkins*, 449.

See APPEAL, 7; EQUITY, 6, SUBROGATION.

SURVEYS.

See PUBLIC LANDS.

TAXES.

1. PERSONAL PROPERTY, WHAT SUBJECT TO.—A SET OF ABSTRACT BOOKS containing information largely in the form of abbreviations and cipher, understood by five persons only, is personal property having a value, and therefore subject to taxation. *Booth* v. *Phelps*, 921.
2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—TAXES are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may properly be regarded as due process of law if it conforms to customary usages. *Wulsen* v. *Board of Supervisors*, 17.
3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—IN MATTERS OF ASSESSMENT and taxation the same character of notice is not required as in ordinary actions in courts of justice, for the reason that in such summary proceedings it is not practicable nor usual. *Wulsen* v. *Board of Supervisors*, 17.

See CHARITIES, 4; STATUTES, 10, 13.

TELEGRAPH COMPANIES.

1. A TELEGRAPH CORPORATION HAS POWER TO MAKE REASONABLE REGULATIONS for the conduct of its business, and its customers are bound by them after they had notice of their existence. *Western Union Tel. Co.* v. *Neel*, 847.
2. RIGHT TO LIMIT LIABILITY.—A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot, by contract, limit or exempt itself from liability for its own negligence. *Pacific Tel. Co.* v. *Underwood*, 490.
3. PRINTED CONDITIONS ON TELEGRAPH BLANKS—EFFECT OF.—A condition printed on a telegraph blank, providing that the company cannot be held liable for damages unless the claim is presented in writing within sixty days is unreasonable and without consideration if viewed as a contract between the telegraph company and the sender of the message, and void as an attempt on the part of the company to limit its liability for its negligence by enacting for itself a statute of limitations. *Pacific Tel. Co.* v. *Underwood*, 490.
4. FAILURE TO DELIVER MESSAGE OUT OF BUSINESS HOURS.—A telegraph corporation has power to adopt reasonable regulations as to its business hours, and is not answerable for delay in the delivery of a message

caused by its being received out of those hours. A person desiring a message delivered at an unusual hour should inquire whether it will be delivered at that time, and, in the absence of such inquiry, the telegraph corporation does not become answerable for the delay by its failure to volunteer the information that the office to which the message is addressed is not open for business until later. *Western Union Tel. Co.* v. *Neel*, 847.

5. EVIDENCE.—PRINTED MATTER ON TELEGRAPH blanks is no part of the message sent, and the written part of the telegram is admissible in evidence without putting in the printed matter on the blank. *Pacific Tel. Co.* v. *Underwood*, 490.

TELEPHONE MESSAGE.

See ATTACHMENT, 9.

TENANTS IN COMMON.

See COTENANCY.

THREATS.

See DURESS, 1; HOMICIDE, 4, 5.

TIMBER.

See CONTRACTS, 2.

TOLL.

See ESTOPPEL, 1.

TRADEMARKS.

1. THE WORDS "BROMO-CAFFEINE," applied to a medicinal preparation, constitute a valid trademark, though before their use as such the same words were employed to designate a chemical compound having no identity of substance or of nature with the medicinal preparation, if the words as used as a trademark do not describe the article or its ingredients and had never been used in medical science to designate any other medicine or medical preparation. *Keasbey* v. *Brooklyn Chemical Works*, 623.

2. WORDS MAY BE PROTECTED AS A TRADEMARK THOUGH they suggest more or less the quality or characteristics of the article, if they were not in common use when first applied as such mark, and did not indicate the chief ingredients of the article. *Keasbey* v. *Brooklyn Chemical Works*, 623.

TRAIN-DISPATCHER.

See RAILROADS, 11, 12.

TRESPASSER.

See RAILROADS, 14.

TRIAL.

1. TRIAL BY JURY CANNOT BE CONSTITUTIONALLY DEMANDED in connection with a prosecution for violation of a municipal ordinance. *State* v. *Fourcade*, 249.

2. JURY TRIAL, WAIVER OF.—If the parties, being present in court, submit their cause to the court upon the pleadings, evidence, and arguments of

counsel, and these acts are entered upon the journal, they thereby waive a trial by jury, though the statute declares that trial by jury may be waived: 1. By the consent of the party appearing, when the other party fails to appear; 2. By written consent filed with the clerk; or 3. By oral consent in open court entered on the journal. *Bonewitz* v. *Bonewitz*, 671.

2. QUOTIENT VERDICTS.—IF JURORS AGREE to mark various sums, add them together, and divide the aggregate sum by twelve, and that the result so ascertained shall be their verdict, such verdict is bad, and will be set aside. On the other hand, if, without any previous agreement, the amounts suggested by each juror are added, and the aggregate divided by twelve and the result accepted by jurors as their verdict, without any agreement between them that such shall be the case, such verdict is not objectionable. *Gordon* v. *Trevarthan*, 452.

4. DETERMINATION OF CHANCE, WHAT IS.—A juror resorts to the determination of chance whenever he resorts to any method of determination, the steps and results of which are beyond his calculation, and not followed nor participated in by his understanding, and, therefore, when a juror agrees to abide by a quotient verdict he resorts to the determination of chance. *Gordon* v. *Trevarthan*, 452.

5. THE AFFIDAVIT OF A JUROR MAY BE RECEIVED to attack his verdict under the statutes of Montana if such affidavit shows a resort to the determination of chance. *Gordon* v. *Trevarthan*, 452.

6. THE AFFIDAVIT OF A JUROR may be received to show that the verdict rendered was a quotient verdict, if the statute authorizes the reception of an affidavit of a juror for the purpose of showing that a verdict was a determination of chance. *Gordon* v. *Trevarthan*, 452.

7. VERDICT AS RECORDED is the verdict of the jury, and the form prepared in the jury-room, though handed to the clerk, is no part of the record, and has no significance whatever. *Commonwealth* v. *Breyessee*, 729.

8. PRACTICE.—A FINDING that plaintiff did not rescind a sale is a finding of fact and not a conclusion of law, and all other findings of fact in the case become unnecessary if the plaintiff's right of recovery is based upon his claim that he had rescinded a sale of the property which he sought to recover in the action. *Hollenbach* v. *Schnabel*, 57.

See APPEAL.

TRIAL BY JURY.

See INSANE PERSONS, 1-3; TRIAL, 1, 2.

TROVER.

1. CONVERSION.—ANY DISTINCT ACT OF DOMINION wrongfully exerted over one's property, in denial of his right, or inconsistent therewith, is and may be treated as a conversion. *Carpenter* v. *American Building etc. Assn.*, 345.

2. CONVERSION—OFFER TO RETURN GOODS.—When an actual conversion of goods has taken place the owner is generally under no obligation to receive them back upon a tender by the wrongdoer before bringing his action, nor does such offer to return mitigate the damages which the owner is entitled to recover. *Carpenter* v. *American Building etc. Assn.*, 345.

3. CONVERSION—OFFER TO RETURN GOODS—MITIGATION OF DAMAGES.—When a conversion lacks the element of willfulness, and has been com-

mitted in good faith, the court in its discretion may order a return of the goods upon timely application by the wrongdoer, accompanied by an offer to pay all costs and a showing that no real injury will result to the owner when possession is restored. The right of action is not defeated by the order of the court, but damages are thereby mitigated. *Carpenter* v. *American Building etc. Assn.*, 345.

TRUST DEEDS.
See CONTRACTS, 8.

TRUSTS.

DEEDS TO ONE "AS TRUSTEE" WITHOUT NAMING OBJECT OF THE TRUST.—While the fact that a grantee in a deed is described as "trustee" gives no notice of the name of the beneficiary or of the character of the trust, yet it imposes the duty of inquiry as to its character and limitations upon a party who takes title under the deed; but all that is required of him is good faith and reasonable care in following up the inquiry which the notice given him suggests. *Mercantile Nat. Bank* v. *Parsons*, 299.

See BONDS; ESTATES, 2, 4; INSOLVENCY; LIMITATIONS OF ACTIONS, 6; LIS PENDENS, 2.

ULTRA VIRES.
See CORPORATIONS, 22, 24.

UNITED STATES.
See JURISDICTION, 2; PUBLIC LANDS.

USAGE.
See CUSTOM.

VAGRANTS.
See MUNICIPAL CORPORATIONS, 15, 16.

VARIANCE.
See APPEAL, 2.

VARIETY SHOWS.
See MUNICIPAL CORPORATIONS, 14–17.

VENDOR AND PURCHASER.

SALE OF LAND—"MORE OR LESS."—When land is sold as containing so many acres, "more or less," and the quantity falls short or overruns a little on actual survey and estimation, no compensation is to be given to either party in the absence of proof of fraud. *Francis* v. *Chancellor*, 548.

VERDICT.
See TRIAL, 3, 7.

VESSELS.
See ADMIRALTY; SHIPPING.

VESTED RIGHTS.

See MUNICIPAL CORPORATIONS, 3, 6; STATUTES, 12.

WAGES.

See ATTACHMENT, 2.

WAIVER.

See INSURANCE, 10, 11; MORTGAGES, 2; TRIAL, 2.

WATER COMPANIES.

See CONTRACTS, 6.

WATERS.

DAMAGES FOR OBSTRUCTING BY LOGS.—One who uses a stream for the purpose of floating logs is not answerable to a riparian proprietor for the jamming of logs together so as to form a gorge, retarding the flow of water, and submerging the plaintiff's lands, unless it appears that the defendant was guilty of a want of ordinary care and prudence in the conduct of his business, and that the damage to plaintiff was suffered because of such lack of care. *Hopkins* v. *Butte etc. Commercial Co.*, 438.

WATER WORKS.

See MUNICIPAL CORPORATIONS, 6; STATUTES, 14.

WAYBILLS.

See BURGLARY, 3, 4.

WILLS.

1. CONSTRUCTION.—In construing a will the language employed in a single sentence is not to control as against the evident purpose and intent as shown by the whole instrument, but effect must be given to such intent. *Watkins* v. *Snadon*, 203.
2. SUBSEQUENT CONVEYANCE AS REVOCATION OF—ELECTION.—A conveyance by a testator to his daughter, after the execution of his will, of lands devised to his son operates as a revocation of the devise to the son, and the daughter is not compelled to elect between the conveyance to her by deed and the benefits derived by her under the will. She takes under both. *Hattersley* v. *Bissett*, 532.
3. CONSTRUCTION—EQUITABLE CONVERSION—LIFE TENANTS—INCOME. The doctrine of equitable conversion is not applied for the purpose of giving to life tenants a portion of the proceeds of sales of unproductive real estate, as income from the time of the testator's death, under a will giving trustees power to sell, and directing them to so invest the estate as to produce income when the estate is large, and as the will directs the proceeds of sales to be reinvested, it is evident that the testator did not intend income to be paid to the life tenants on account of property from which none was realized. In such case money expended from the income of the estate for taxes or improvements upon real estate which is nonproductive, should be refunded to the life tenants from the proceeds of the sale of such real estate. *Hite* v. *Hite*, 189.

4. REMAINDERS—POSSESSION AS BETWEEN LIFE TENANT AND REMAINDERMAN.—When from all the terms of a will it appears that a testator, in making a general devise of money, stocks, or bonds to a tenant for life with remainder over, intended that the life tenant should have possession of the thing devised effect must be given to such purpose and intent. *Watkins* v. *Snadon*, 203.

See DEVISE; ESTATES, 2, 3; EXECUTORS AND ADMINISTRATORS; POWERS.

WITNESSES.

1. EVIDENCE—PROOF OF GOOD CHARACTER.—A witness may base his knowledge of the person whose character is in question upon the fact that the witness has never heard any thing against the character of such person. *State* v. *Brandenburg*, 362.

2. COMPETENCY—UNDERSTANDING.—The mere fact that a witness states, on cross-examination, that she does not know the consequences, nor how she could be punished, if she testifies falsely does not render her incompetent on the ground that she does not understand the nature of an oath, especially when she exhibits as much intelligence on the witness-stand as ordinary persons of her class. *State* v. *Langford*, 277.

3. IMPEACHMENT OF BY PARTY CALLING.—A party calling a witness who is surprised by his adverse testimony may, after proper preliminary proof and in the discretion of the court, be permitted to show that he has made previous statements contrary to his testimony. *Selover* v. *Bryant*, 349.

4. IMPEACHMENT BY COLLATERAL MATTER TENDING TO DEGRADE.—A witness can be impeached by requiring him on cross-examination to testify and disclose collateral matters as to his personal history tending to disgrace but not to incriminate him. *Carroll* v. *State*, 786.

5. IMPEACHMENT OF BY COLLATERAL MATTER TENDING TO DEGRADE.—A witness may, on cross-examination, be asked any question which tends to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer such question, however irrelevant to the facts in issue, and however disgraceful to himself, except when the answer might expose him to a criminal charge. *Carroll* v. *State*, 786.

6. IMPEACHMENT BY COLLATERAL MATTER TENDING TO DEGRADE.—If it can be made to appear on cross-examination that the witness has had a previous criminal experience, or has spent part of his life in jail, or has been convicted, or has suffered some infamous punishment, or has been in jail on a criminal charge, such matters tend to shake or impair his credit, and the jury should have such information. *Carroll* v. *State*, 786.

7. IMPEACHMENT BY MATTERS TENDING TO DEGRADE—LIMITATIONS ON EXAMINATION.—When a witness is cross-examined as to collateral matters tending to degrade him the court should limit the examination to transactions comparatively recent, bearing directly upon the present character of the witness, and essential to a true estimation of his testimony by the jury. *Carroll* v. *State*, 786.

8. IMPEACHMENT BY MATTER TENDING TO DEGRADE—LIMIT OF EXAMINATION.—When a witness is asked on cross-examination a question tending to disgrace him, and answers the question, the cross-examining party is, in general, bound by the answer, if collateral to the issue and only going to the credit of the witness, and contradictory evidence is not admissible to impeach him as to such matter. *Carroll* v. *State*, 786.

2. IMPEACHMENT BY MATTER TENDING TO DEGRADE.—A witness may, on cross-examination, be interrogated as to his having been imprisoned in a penitentiary or jail, whether after conviction or when he is under bonds to answer a preliminary charge. *Carroll* v. *State*, 786.

See CONTEMPT, 1; DEPOSITIONS; NEW TRIAL, 1; NOTARIES PUBLIC; RAPE, 1.

WRIT OF ERROR.

See HABEAS CORPUS, 1, 2.


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